(10)

No. 05-746
Title: Norfolk Southern Railway Company, Petitioner
v.
Timothy Sorrell
Docketed: December 12, 2005
Lower Ct: Court of Appeals of Missouri, Eastern District
Case Nos.: (ED84268)
Decision Date: July 5, 2005
Rehearing Denied: August 22, 2005
Discretionary Court
Decision Date: September 20, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 14 2005	Application (05A326) for a stay of judgment, submitted to Justice Thomas.
Oct 14 2005	Application (05A326) denied by Justice Thomas.
Dec 7 2005	Petition for a writ of certiorari filed. (Response due January 11, 2006)
Jan 4 2006	Waiver of right of respondent Timothy Sorrell to respond filed.
Jan 10 2006	Motion for leave to file amicus brief filed by Association of American Railroads.
Jan 18 2006	DISTRIBUTED for Conference of February 17, 2006.
Feb 1 2006	Response Requested . (Due March 3, 2006)
Feb 23 2006	Order extending time to file response to petition to and including April 3, 2006.
Mar 23 2006	Order further extending time to file response to petition to and including April 10, 2006.
Apr 7 2006	Brief of respondent Timothy Sorrell in opposition filed.
Apr 17 2006	Reply of petitioner Norfolk Southern Railway Company filed.
Apr 18 2006	DISTRIBUTED for Conference of May 11, 2006.
May 15 2006	Motion for leave to file amicus brief filed by Association of American Railroads GRANTED.
May 15 2006	Petition GRANTED. limited to Question 1 presented by the petition.
Jun 12 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 17, 2006.
Jun 12 2006	Extension of time within which to file the respondent's brief on the merits to and including September 7, 2006.
Jul 14 2006	SET FOR ARGUMENT on Tuesday, October 10, 2006.
Jul 17 2006	Joint appendix filed.
Jul 17 2006	Brief of petitioner Norfolk Southern Railway Company filed.
Jul 17 2006	Motion for leave to file amicus brief filed by Association of American Railroads.
Jul 25 2006	CIRCULATED.
Aug 8 2006	Record received from Court of Appeals of Missouri, Eastern District. (1 box)
Aug 14 2006	SET FOR ARGUMENT on Tuesday, October 10, 2006.
Sep 1 2006	Motion for leave to file amicus brief filed by Association of American Railroads GRANTED.
Sep 1 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.

Sep 7 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
Sep 7 2006	Brief amici curiae of American Train Dispatchers Association, et al. filed. (Distributed)
Sep 7 2006	Brief of respondent Timothy Sorrell filed. (Distributed)
Sep 22 2006	Motion of American Train Dispatchers Association, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Sep 28 2006	Reply of petitioner Norfolk Southern Railway Company filed. (Distributed)
Oct 5 2006	Motion DISTRIBUTED for Conference of October 6, 2006..
Oct 6 2006	Motion of American Train Dispatchers Association, et al. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Oct 10 2006	Argued. For petitioner: Carter G. Phillips, Washington, D.C. For respondent: Mary Perry, St. Louis, Mo.

Supreme Court, U.S.
FILED

No. 05- 05 - 746 DEC 7 - 2005

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below erred in determining—in conflict with this Court and multiple courts of appeals—that the causation standard for employee *contributory negligence* under the Federal Employers Liability Act ("FELA") differs from the causation standard for railroad *negligence*.

2. Whether, under the comparative negligence scheme of FELA, state courts may rely upon a jury instruction and verdict form mandated by state law that make it impossible for defendants and courts to determine whether and to what extent a jury found contributory negligence on the part of the plaintiff, and which treat FELA defendants differently from all other litigants.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

RULE 29.6 STATEMENT

Norfolk Southern Railway Company has a parent company, the Norfolk Southern Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
JUDGMENT FOR WHICH REVIEW IS SOUGHT	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Statutory Background	3
B. Factual Background	4
C. Proceedings Below	4
REASONS FOR GRANTING THE PETITION	8
I. MISSOURI'S JURY INSTRUCTIONS MAY NOT ABRIDGE THE FEDERAL RULE UNDER FELA THAT THE SAME CAUSATION STANDARDS APPLY TO RAILROAD AND EMPLOYEE NEGLIGENCE	9
II. MISSOURI'S MANDATORY GENERAL-VERDICT RULE IS CONTRARY TO PRECEDENTS OF THIS COURT AND FEDERAL COURTS OF APPEALS, AND IMPERMISSIBLY DISCRIMINATES AGAINST FEDERAL RIGHTS	17
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Akermanis v. *Sea-Land Serv., Inc.*, 688 F.2d 898 (2d Cir. 1982) 21
American Ry. Express Co. v. *Levee*, 263 U.S. 19 (1923) 20
Anglim v. *Missouri Pac. R.R.*, 832 S.W.2d 298 (Mo. 1992) 16
Atlantic Coast Line R.R. v. *Mims*, 242 U.S. 532 (1917) 20
Besse v. *Missouri Pac. R.R.*, 721 S.W.2d 740 (Mo. 1986) 16
Blue v. *Western Ry. of Ala.*, 469 F.2d 487 (5th Cir. 1972) 20
Brown v. *Western Ry. of Ala.*, 338 U.S. 294 (1949) 20
Bueche v. *Kansas City*, 492 S.W.2d 835 (Mo. 1973) 13
Caplinger v. *Northern Pac. Terminal*, 418 P.2d 34 (Ore. 1966) 14
Carter v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949) 11
Consolidated Rail Corp. v. *Gottshall*, 512 U.S. 532 (1994) 3
Davis v. *Wolfe*, 263 U.S. 239 (1923) 15
Dice v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952) 20
Dixon v. *First Cent. Co.*, 481 F.2d 833 (6th Cir. 1973) 14
Euton v. *Norfolk & W. Ry.*, 936 S.W.2d 146 (Mo. Ct. App. 1996) 16
Fashauer v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269 (3d Cir. 1995) 13, 14, 21
Ferguson v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957) 3

TABLE OF AUTHORITIES—continued

Page

Fish v. *Chicago Rock Island & Pac. Ry.*, 172 S.W. 340 (Mo. 1914) 13

Flener v. *Louisville & Nashville Ry.*, 198 F.2d 77 (7th Cir. 1952) 20

Ganotis v. *New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965) 14

Grand Trunk W. Ry. v. *Lindsay*, 233 U.S. 42 (1914) 10

Illinois Cent. R.R. v. *Skaggs*, 240 U.S. 66 (1916) 9, 10, 11

Ingle v. *Illinois Cent. Gulf R.R. Co.*, 608 S.W.2d 76 (Mo. Ct. App. 1980) 17

Koivunen v. *State Line*, 371 F.2d 781 (9th Cir. 1967) 20

Leake v. *Burlington N. R.R.*, 892 S.W.2d 359 (Mo. Ct. App. 1995) 12

McKnett v. *St. Louis & S.F. Ry.*, 292 U.S. 230 (1934) 22

Melton v. *Illinois Cent. Gulf R.R.*, 763 S.W.2d 321 (Mo. Ct. App. 1988) 17

Mondou v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1 (1912) 3

New York Cent. R.R. Co. v. *Winfield*, 244 U.S. 147 (1917) 15

Norfolk & W. Ry. v. *Earnest*, 229 U.S. 114 (1913) 2, 10, 11, 19

Page v. *St. Louis S.W. Ry.*, 349 F.2d 820 (5th Cir. 1965) 14

Robertson v. *Burlington N. & Santa Fe R.R.*, 785 S.W.2d 626 (Mo. Ct. App. 1990) 16

Schadel v. *Iowa Interstate R.R.*, 381 F.3d 671 (7th Cir. 2004) 21

Seaboard Air Line Ry. v. *Tilghman*, 237 U.S. 499 (1915) 11

TABLE OF AUTHORITIES—continued

Page

Snyder v. *Chicago, Rock Island & Pac. R.R.*, 521 S.W.2d 161 (Mo. Ct. App. 1973) 12
St. Louis S.W. Ry. v. *Dickerson*, 470 U.S. 409 (1985) 2, 8, 15, 20
Stanislawski v. *Upper River Servs., Inc.*, 6 F.3d 537 (8th Cir. 1993) 21
State ex rel. Kansas City S. Ry. v. *Mauer*, 998 S.W.2d 185 (Mo. Ct. App. 1999) 16
State ex rel. Linthicum v. *Calvin*, 57 S.W.3d 855 (Mo. 2001) 16
Tennant v. *Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944) 15
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) 3, 9
USDA v. *Moreno*, 413 U.S. 528 (1973) 22
Urie v. *Thompson*, 337 U.S. 163 (1949) 2, 3, 22
Wetherbee v. *Elgin, Joliet & E. Ry.*, 191 F.2d 302 (7th Cir. 1951) 20
Wilmoth v. *Chicago, Rock Island & Pac. R.R.*, 486 S.W.2d 631 (Mo. 1972) 12

STATUTES

45 U.S.C. § 51 ..... 3, 12
45 U.S.C. §§ 51-60 ..... 1, 2
45 U.S.C. § 53 ..... 2, 3, 7
45 U.S.C. § 56 16

RULES AND ORDERS

Mo. R. Civ. P. 70.02(b) 13
Mo. Sup. Ct. R. 83.04 8
Order of Apr. 8, 2002 (Mo.) 13

TABLE OF AUTHORITIES—continued

LEGISLATIVE HISTORY Page

H.R. Rep. No. 60-1386 (1908) 3, 11

SCHOLARLY AUTHORITY

1 Dan B. Dobbs, *The Law of Torts* (2001) 10, 12
Restatement (Second) of Torts (1965) 10
Restatement (Third) of Torts: Apportionment of Liability (1999) 10, 12

OTHER AUTHORITIES

Eleventh Circuit Pattern Jury Instructions (Civil Cases) (1999) 14, 21
Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit (2001) 14, 21
Missouri Approved Jury Instructions (6th ed. 2002) ..... *passim*
Ninth Circuit Manual of Model Civil Jury Instructions (2004) 14, 21
Pattern Jury Instructions [Civil] for the Fifth Circuit (1999) 14, 21
Report Names Madison County The Top "Judicial Hellhole" in U.S., St. Louis Bus. J., Nov. 6, 2003, *available at* http://stlouis.bizjournals.com/stlouis/stories/2003/11/03/daily59.html 16
Tim Bryant, *Missouri Supreme Court Judge Suggests Mixing City, County Jury Pools*, St. Louis Post Dispatch, Nov. 27, 2002 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner Norfolk Southern Railway Company ("Norfolk Southern") respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The order of the Missouri Court of Appeals affirming the judgment of the trial court is published at 170 S.W.3d 35 (Mo. Ct. App. 2005) (per curiam), and is reproduced in the Petition Appendix ("Pet. App.") at 1a-2a. That order was accompanied by an unpublished opinion, which is reproduced at Pet. App. 3a-21a. The Missouri Court of Appeals' order denying rehearing and/or transfer to the Missouri Supreme Court is reproduced at Pet. App. 32a. The order of the Missouri Supreme Court denying an application for transfer from the Missouri Court of Appeals is reproduced at Pet. App. 31a.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on July 5, 2005. Pet. App. 1a. The Missouri Court of Appeals denied rehearing and transfer to the Missouri Supreme Court on August 22, 2005. Pet. App. 32a. The Missouri Supreme Court denied transfer on September 20, 2005. Pet. App. 31a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, are reproduced at Pet. App. 33a-34a. Missouri Approved Instructions ("MAI") 8.02, 24.01, 32.07(B), 36.01 and 37.07 are reproduced at Pet. App. 35a-38a.

STATEMENT OF THE CASE

Under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60, state courts have jurisdiction over personal injury claims brought by railroad employees against their employer, but those courts must apply the common law "'as established and applied in the federal courts.'" *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). This Court has admonished the Missouri courts that the Missouri Approved Instructions ("MAI") promulgated by the Missouri Supreme Court may not be employed to defeat federal substantive rights established by FELA. *St. Louis S.W. Ry. Co.* v. *Dickerson*, 470 U.S. 409, 411 (1985) (per curiam). But that is exactly what the Missouri court did below. It refused to follow the rule uniformly applied in the federal courts that the same causation standard governs claims of railroad negligence and employee contributory negligence. The state court did so for the sole reason that the federal rule conflicted with an MAI, which it held was binding upon state trial courts even in FELA cases.

The court below also impermissibly invoked the MAI to deny Norfolk Southern its federal right to determine whether the jury properly diminished damages for contributory negligence. See 45 U.S.C. § 53; *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 121-22 (1913). The state court's ruling on these points is not only flatly contrary to *Dickerson*, but also has created a substantial conflict of authority with federal courts of appeals and state supreme courts.

Certiorari is warranted to resolve the fundamental conflicts of authority regarding the administration of FELA. Alternatively, the proper resolution of the first question presented is so plain, and the conflict with this Court's precedent so egregious, that the Court may wish to consider summary reversal.

A. Statutory Background

FELA is the exclusive remedial scheme for practically all railroad workplace injuries. Because of FELA, there is no worker's compensation program for railroad employees. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994); *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 538-39 (1957) (Frankfurter, J., dissenting). Moreover, FELA broadly preempts state tort statutes that would otherwise apply to such injuries. *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 55 (1912). Accordingly, the causation standards at issue here implicate nearly every case involving an employee's injury while employed by a railroad.

Section 1 of FELA makes "[e]very common carrier by railroad . . . liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie*, 337 U.S. at 174.

One such departure from the common law concerns contributory negligence. Section 3 of FELA provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. Congress thus "substitut[ed] comparative negligence for the strict rule of contributory negligence" under traditional common law, whereby a plaintiff whose negligence contributed to his injury was foreclosed from any recovery. *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 62 (1943). This modification of the common-law rule was motivated by concerns of simple justice: It made "each party responsible for his own negligence, and require[d] each to bear the burden thereof." H.R. Rep. No. 60-1386, at 1 (1908); see also *id.* at 5 ("What can be

more fair than that each party shall suffer the consequences of his own carelessness?").

B. Factual Background

Respondent Sorrell was employed as a trackman by Norfolk Southern. Trial Transcript ("Tr.") 393. As such, he was a "general laborer," and performed various jobs related to track maintenance. *Id.* at 393-94. On November 1, 1999, he drove a dump truck to pick up materials in Elkhart, Indiana, that would be used to repair rail crossings. *Id.* at 405, 409-10. He unloaded some of the materials at the first assigned crossing, *id.* at 410, and was on a gravel road headed for the next crossing when, according to Sorrell, another vehicle approached him, *id.* at 412. The approaching vehicle was another Norfolk Southern truck, driven by Norfolk Southern employee Keith Woodin. *Id.* at 418. Sorrell testified that he slowed down, and pulled far to the right because he did not believe the two trucks could pass one another. *Id.* at 413-14. Just as the trucks passed each other, he testified, his front tire dropped into a four-foot ditch, and the truck tipped over onto its side. *Id.* at 414-15.

Woodin provided a very different account. He testified that when he saw Sorrell approaching, he pulled his truck off the road, and was "basically stopped." Tr. at 239. Furthermore, he testified, Sorrell pulled his truck off the road when the two trucks were still 400-500 feet apart, and that was when Sorrell's wheel fell into the roadside ditch. *Id.* at 240. When he saw that happen, Woodin drove to Sorrell, in order to assist him. *Id.* at 241. At about the time that Woodin's truck approached Sorrell's, Sorrell's truck rolled over. *Id.* at 242. Simply put, Sorrell claimed that Woodin forced him off the road and Woodin testified that Sorrell drove himself into the ditch.

C. Proceedings Below

Sorrell brought suit under FELA, alleging that Norfolk Southern failed to provide him "a reasonably safe place to

work," "reasonably safe methods for work," "reasonably safe conditions for work," and "reasonably safe equipment, tools and appliances for work." First Am. Pet. 2 (L.F. 9).[1] He sought damages stemming from various claimed physical injuries, as well as medical expenses, lost wages, and pain and suffering. *Id.*[2] The case was tried to a jury and Norfolk Southern argued, *inter alia*, that Sorrell was contributorily negligent when he drove his truck into the ditch. See, *e.g.*, Tr. 666 (closing argument; noting "comparative fault"); *id.* at 666-67 (urging the jury to "consider the fault of Tim Sorrell"); see generally *id.* at 659-66 (discussing same).

Norfolk Southern asked the court to instruct the jury that the causation standard for Sorrell's own contributory negligence is identical to the causation standard for Norfolk Southern's negligence. Tr. 574-75 (Pet. App. 27a-28a). It argued that FELA employs a pure comparative fault system, which requires that the same standards of causation apply both to the plaintiff's and the defendant's negligence. *Id.* at 575 (Pet. App. 28a-29a). The judge rejected this request, because the Missouri Approved Instructions, which are approved by the Missouri Supreme Court, impose different standards of causation for the two forms of negligence. *Id.* at 576 (Pet. App. 29a). Missouri's approved instruction for railroad negligence requires only a finding that such negligence contributed "in whole or in part" to the plaintiff's injury. MAI 24.01 (Pet. App. 35a-36a).[3] By contrast, the approved instruction regard-

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[1] "LF" citations are to the "Legal File" submitted to the Missouri Court of Appeals, which contains excerpts of the trial record.

[2] Sorrell also brought a second cause of action related to an injury that he purportedly suffered while using a tamping tool. First Am. Pet. 3 (L.F. 10). The jury awarded no damages on that claim, and it is not before this Court. *See* Verdict (Pet. App. 25a); Judgment (Pet. App. 22a-23a).

[3] MAI 24.01 requires that the jury be instructed as follows:

Your verdict must be for plaintiff if you believe:

ing the plaintiff's contributory negligence requires defendants to meet the heavier burden of showing that the plaintiff's negligence "*directly* contributed to cause his injury." MAI 32.07(B) (Pet. App. 36a) (emphasis added).[4]

Norfolk Southern also asked the court to instruct the jury to specify whether it found Sorrell to have been contributorily negligent and if so, in what proportion. Tr. 576-78 (Pet. App. 29a-30a); see also Defendant's Objections to the Use of MAI 8.02 and MAI 36.01 as Violating the United States Constitution (L.F. 35-42). That is the normal practice in Missouri in personal injury cases involving comparative negligence claims. See MAI 37.07 (Pet. App. 37a-38a). The Missouri Approved Instruction regarding FELA is different; it does not require the jury to specify this information. See MAI 8.02 (Pet App. 35a). Norfolk Southern argued that, unless the jury provides this information, a FELA defendant cannot discern whether and to what extent the jury found contributory negligence, and the courts cannot ensure that the jury faithfully

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First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and

Second, [with respect to such conditions for work,] defendant either failed to provide: reasonably safe conditions for work, or reasonably safe appliances, or reasonably safe methods of work, or reasonably adequate help, and

Third, defendant in any one or more the respects submitted in Paragraph Second was negligent, and

Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].

[4] MAI 32.07(B) requires that the jury be instructed as follows:

You must find plaintiff contributorily negligent if you believe:

First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

followed FELA's command that a plaintiff's damages be reduced "in proportion to [the employee's] negligence," 45 U.S.C. § 53. Accordingly, Norfolk Southern argued, the failure to provide such an instruction in FELA cases is contrary to FELA itself. Tr. 576-78 (Pet. App. 29a-30a); see Defendant's Objections to the Use of MAI 8.02 and MAI 36.01 as Violating the United States Constitution (L.F. 35-42). Because, however, the Missouri Approved Instruction does not require the jury to provide this information, the trial judge refused to instruct the jury to do so. Tr. 577, 578 (Pet. App. 30a).

The jury returned a verdict against Norfolk Southern in the amount of $1.5 million. In accordance with the jury instructions, the verdict form did not reflect whether the jury had determined that Sorrell was contributorily negligent nor, if so, the extent to which the jury may have reduced plaintiff's damages. See Verdict B (Pet. App. 26a).[5] Norfolk Southern's motion for a new trial was denied. L.F. 189.

On appeal, the Missouri Court of Appeals affirmed solely on the ground that the MAI was binding; it did not address what federal law requires. Pet. App. 7a. In rejecting Norfolk Southern's argument that the jury should have been asked to specify whether and to what extent it found comparative negligence, the court conceded that Missouri juries are required to do so in comparative negligence cases under state law, but nonetheless found that the MAI was binding and permitted only a general verdict in FELA cases. *Id.* at 17a.

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[5] The Petition Appendix includes both the Verdict form (Pet. App. 25a-26a), which was filled out by the jury, and the Judgment (*id.* at 22a-24a), which was completed by counsel after the verdict was announced. Pursuant to the judge's conclusions and MAI, the Verdict has no space for the jury to indicate contributory negligence. The Judgment has a space where contributory negligence can be specified, but this was never provided to the jury, and counsel of course left this space blank.

Norfolk Southern moved the Missouri Court of Appeals to rehear the case, or to transfer it to the Missouri Supreme Court, both of which motions were denied. Pet. App. 31a-32a. It then filed an Application for Transfer with the Missouri Supreme Court (which is similar in nature to a petition for a writ of certiorari, see Mo. Sup. Ct. R. 83.04). That application also was denied. Pet. App. 31a.

REASONS FOR GRANTING THE PETITION

The Missouri Supreme Court has issued procedural rules binding on the state's lower courts—specifically, jury instructions regarding causation standards under FELA—that impermissibly defeat federal substantive rights. With regard to the standard of causation under FELA, the Missouri courts are alone in holding that different substantive standards of causation apply to a railroad defendant's negligence and a plaintiff employee's contributory negligence. This rule stands in conflict with every court to consider the issue, and with numerous jury instructions in the federal courts. The Missouri rule is indefensible under federal law, and the court below did not attempt such a defense. It simply fell back on the binding nature of the Missouri Approved Instructions as a matter of state law. But, this Court has already instructed the Missouri courts that the Missouri jury instructions may not be used to defeat substantive rights under FELA. See *Dickerson*, 470 U.S. at 411.

The Missouri court likewise invoked the MAI to deny special verdicts that are essential for courts to review juries' application of FELA's comparative negligence requirements. The mandatory general-verdict rule applied in Missouri impermissibly denies FELA defendants vindication of federal rights, discriminates against the assertion of federal rights, and is contrary to the rule of the federal courts of appeals. Accordingly, this Court should grant review.

I. MISSOURI'S JURY INSTRUCTIONS MAY NOT ABRIDGE THE FEDERAL RULE UNDER FELA THAT THE SAME CAUSATION STANDARDS APPLY TO RAILROAD AND EMPLOYEE NEGLIGENCE.

The Missouri Supreme Court has issued mandatory jury instructions that require the jury to apply divergent causation standards for railroad and employee negligence. The court below held that the MAI are binding notwithstanding the federal rule to the contrary. The decision below is contrary to the plain language of FELA and the apportionment rules recognized by this Court; creates a clear conflict with federal courts of appeals and state supreme courts; and runs directly afoul of this Court's precedents holding that Missouri courts may not rely on MAI in disregard of federal law.

1. As previously explained, under FELA Congress "substitut[ed] comparative negligence for the strict rule of contributory negligence." *Tiller*, 318 U.S. at 62 (1943). In operation, this system should be simple. So long as the employer's negligence is a legal cause of the plaintiff's injuries, it is liable in damages. If, however, the employee's own negligence is also a legal cause of his injuries, his damages are decreased in proportion to his fault. Each party is responsible for the proportion of damages caused by its proportionate fault.

This is precisely how this Court repeatedly has described the functioning of FELA's comparative negligence system for more than 90 years. In *Illinois Central Railroad* v. *Skaggs*, the Court approved a jury instruction that provided:

> if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame, and the plaintiff would be responsible himself to the extent to which he was to blame.

240 U.S. 66, 73 (1916).[6] *Skaggs*, and this Court's other precedents like it, do not even hint that the standards of causation for negligence and contributory negligence may differ. Rather, as these decisions recognize, the appropriate point of comparison is the parties' relative "blame"—i.e., their fault. "The orthodox view in negligence cases is that comparative negligence is just what it sounds like—a comparison of the negligence or culpability of each party, an idea easily understood as a comparison of the unjustified risks taken by each." 1 Dan B. Dobbs, *The Law of Torts* § 202, at 509 (2001).

The same causation standards have always applied to both defendant and plaintiff negligence, both under traditional contributory negligence rules and under modern comparative negligence schemes. "The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others." *Restatement (Second) of Torts* § 465(2) (1965); see also *Restatement (Third) of Torts: Apportionment of Liability* § 3 (1999) ("Plaintiff's negligence is defined by the applicable standard for a defendant's negligence.").[7]

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[6] *Accord Grand Trunk W. Ry.* v. *Lindsay*, 233 U.S. 42, 49 (1914) ("the damages are to be diminished in the proportion which [the plaintiff's] negligence bears to the combined negligence of himself and the carrier, —in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee"); *Earnest*, 229 U.S. at 121-22.

[7] *Accord Restatement (Second) of Torts* § 465 cmt.b:

> The rules which determine whether the causal relation between the plaintiff's conduct and his harm is such as to make the law regard it as a legally contributing cause and, therefore, ... sufficient to make his failure to exercise reasonable care for his own protection contributory negligence barring him from recovery against a negligent defendant, are the same as those which determine whether the conduct of the actor as defendant is sufficient to make him responsible and, therefore, liable for a harm to another.

Indeed, no other rule can logically apply in the comparative negligence scheme created by FELA.

> [W]here the *causal negligence* is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery *a proportional part of the damages corresponding to the employee's contribution to the total negligence.*

Seaboard Air Line Ry. v. *Tilghman*, 237 U.S. 499, 501 (1915) (emphases added). Thus, under FELA, the jury must determine the total "causal negligence" of both railroad and employee; apportion that total between the railroad and employee according to relevant fault; and award "a proportional part of the damages corresponding to the employee's contribution to the total negligence." *Id.*; *Earnest*, 229 U.S. at 122; see also *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435-36 (1949). FELA presupposes that the causal negligence of the railroad and the employee can be summed and mathematically compared to the total, which would be nonsensical if different causation standards applied to the two types of negligence. Moreover, FELA is designed so that both the railroad and the employee "bear the burden" of their own negligence. H.R. Rep. No. 60-1386, at 1; *Skaggs*, 240 U.S. at 73 (under FELA "the plaintiff would be responsible himself to the extent to which he was to blame"). The FELA scheme of fair apportionment is thwarted when the plaintiff is relieved of his relative share of responsibility by applying a more exacting causation standard to evidence of his negligence than is applied to claims of railroad negligence.

In short, fault, not causation, is the relevant metric for apportioning financial responsibility for injury between the railroad and the employee. Causation is simply a "gatekeeping concept[]" that performs the same function for negligence and

contributory negligence—it "exclud[es] some negligence from consideration when it is not causal in fact and when it is too remote." 1 Dobbs, *supra*, § 202, at 509.[8] "But this does not mean that causation itself is somehow put on the scales and weighed." *Id.* Any other rule would be wildly impractical, because it would be "difficult to administer when different rules govern different parts of the same lawsuit." *Restatement (Third) of Torts: Apportionment of Liability* § 3 reporters note to cmt.a, at 37.

2. Without regard for the operation of the FELA comparative negligence scheme, the Missouri Supreme Court has required the lower Missouri courts to use jury instructions that employ different causation standards for negligence and contributory negligence under FELA. The Missouri Approved Instruction for FELA negligence requires that the railroad's "negligence resulted in whole or in part in [injury to plaintiff]." MAI 24.01 (footnote omitted) (brackets in original) (Pet. App. 36a). Although the instruction tracks the statutory language, see 45 U.S.C. § 51, the Missouri courts have interpreted the language of the statute and the instruction to abrogate the rule of proximate cause. *Leake* v. *Burlington N. R.R.*, 892 S.W.2d 359, 365 (Mo. Ct. App. 1995); *Snyder* v. *Chicago, Rock Island & Pac. R.R.*, 521 S.W.2d 161, 165 (Mo. Ct. App. 1973); *Wilmoth* v. *Chicago, Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972). But the Missouri Approved Instruction imposes a heavier burden of proving proximate cause for FELA *contributory negligence*. The plaintiff's own negligence must have "*directly* contributed to cause his injury." MAI 32.07(B) (emphasis added) (Pet. App. 36a); see *Leake*, 892 S.W.2d at 365 (instruction requiring "direct" causation requires proximate cause); *Snyder*, 521

[8] *See also* 1 Dobbs, *supra*, § 201, at 504 ("[C]ourts in negligence cases ordinarily compare fault, not causation. Causation usually remains an all or nothing issue. Once it is established, the causal fault of the plaintiff is compared with the causal fault of the defendant.").

S.W.2d at 165 (same); *Fish* v. *Chicago Rock Island & Pac. Ry.*, 172 S.W. 340, 346 (Mo. 1914).

Importantly, Missouri's use of different causation standards for negligence and contributory negligence is the final, considered and binding position of the Missouri Supreme Court. Lower Missouri courts must employ them. *Bueche* v. *Kansas City*, 492 S.W.2d 835, 840 (Mo. 1973) ("It is well settled that when a MAI instruction is applicable, its use is mandatory.").[9] So although Norfolk Southern asked the trial court to employ a modified form of MAI 32.07(B) (the FELA instruction) that would mirror the causation standard in MAI 24.01 (the usual instruction), see Tr. 574-75 (Pet. App. 27a-28a); Pet. App. 6a-7a, the trial court declined to do so, and "suggest[ed]" that Norfolk Southern present its argument to the Jury Instruction Committee of the Missouri Supreme Court, Tr. 576 (Pet. App. 29a). The Missouri Court of Appeals likewise affirmed on the sole ground that the MAI are binding, Pet. App. 7a, and the Missouri Supreme Court denied review, *id.* at 31a.

3. Because divergent causation standards are irreconcilable with the FELA comparative negligence scheme, it is unsurprising that the decision below has created a sharp conflict with the federal courts of appeals and state supreme courts that have addressed the issue. The Third, Fifth and Sixth Circuits and the Oregon Supreme Court all have held that FELA's causation standards for negligence and contributory negligence are the same. In *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, the Third Circuit upheld a jury instruction that "[t]o determine whether the plaintiff was contributorily negligent, you apply the same definition of negligence [that applies to the defendant] .... You also apply the same

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[9] *See also* Order of Apr. 8, 2002 (Mo.) (en banc) ("The aforesaid forms *must* be used on and after January 1, 2003 ...." (emphasis added)); *accord* Mo. R. Civ. P. 70.02(b) ("Whenever Missouri Approved Instructions contains an instruction applicable in a particular case ..., such instruction shall be given to the exclusion of any other instructions on the same subject.").

rule of causation." 57 F.3d 1269, 1282 (3d Cir. 1995). The plaintiff had argued that the standards of causation that apply to plaintiffs and defendants should be different, but the Third Circuit, recognizing that such an argument is incompatible with FELA's comparative negligence scheme, held this argument to be "insubstantial." *Id.* at 1282; see also *Page* v. *St. Louis S.W. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965) ("we think the better rule is one of a single standard"); *Dixon* v. *First Cent. Co.*, 481 F.2d 833, 835 (6th Cir. 1973); *Ganotis* v. *New York Cent. R.R.*, 342 F.2d 767, 768-69 (6th Cir. 1965) ("We do not believe that the Act ... intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and proximate cause when considered in connection with the employee's contributory negligence."); *Caplinger* v. *Northern Pac. Terminal*, 418 P.2d 34, 35-36 (Or. 1966).

Likewise, the model jury instructions in four courts of appeals employ the same standard for negligence and contributory negligence. These include the instructions in the Eighth Circuit (where Missouri is located), as well as the Fifth, Ninth and Eleventh Circuits. See *Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit* § 7.03 & n.7 (2001) ("A single standard of causation is to be applied to the plaintiff's negligence claim and the railroad's claim of contributory negligence.").[10]

The predicate rule in Missouri that FELA eliminates the proximate cause requirement for railroad negligence is con-

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[10] *See also Pattern Jury Instructions [Civil] for the Fifth Circuit* § 5.1 (1999) (defining both negligence and contributory negligence with regard to "legal cause"); *Ninth Circuit Manual of Model Civil Jury Instructions* §§ 8.1, 8.4, 8.7 (2004) (providing a singular definition for causation as "a cause of an injury or damage if it played any part, no matter how small, in bringing about the injury or damage"); *Eleventh Circuit Pattern Jury Instructions (Civil Cases)* § 7.1 (1999) (defining both negligence and contributory negligence with reference to the same definition of "legal cause").

trary to federal law, see *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944), but at a minimum this Court should not allow a substantial and unjustified circuit conflict to persist. This Court's intervention is imperative.

4. The Missouri courts' refusal to look beyond the Missouri Approved Instructions flies directly in the face of this Court's decision in *Dickerson*. In that case, just as here, the Missouri Court of Appeals held that the issuance of a certain jury instruction was required because it was mandated by the Missouri Approved Instructions. 470 U.S. at 411. This Court reversed in a per curiam decision. It held that although "FELA cases adjudicated in state courts are subject to state procedural rules, ... the substantive law governing them is federal." *Id.* Accordingly, the objection to the jury instruction "cannot be dismissed on the ground that such an instruction is not to be found in the Missouri Approved Instructions. Whether such an instruction should have been given is a federal question." *Id.*

This case stands in precisely the same posture. The Missouri Court of Appeals in this case, just as it did in *Dickerson*, erroneously permitted Missouri jury instructions to trump federal substantive law. And, as in *Dickerson*, its substantive conclusion was mistaken. There simply is no reasoned basis upon which to apply different causation standards to a defendant's negligence and a plaintiff's contributory negligence, as every court to consider the issue under federal law has determined. Accordingly, for the same reasons summary reversal was appropriate in *Dickerson*, it is likewise warranted here.

5. It is of paramount importance that this Court correct the Missouri court's stark disregard of *Dickerson* and its departure from federal law. FELA is intended to create a uniform federal remedy throughout the United States, see, *e.g.*, *New York Cent. R.R.* v. *Winfield*, 244 U.S. 147, 150 (1917), and a conflict on something so basic as causation standards is antithetical to that statutory purpose. FELA cases commonly pre-

sent questions of whether, and to what degree, railroad or employee negligence caused an injury. It is untenable for different rules to apply in different courts, depending on where the suit is brought. Moreover, as noted above, see *supra* at 14, the Eighth Circuit pattern jury instructions mandate a uniform standard for plaintiff and defendant causation, which conflicts directly with the Missouri Supreme Court's standard, and will cause forum shopping for substantive advantage even within a single state.

The need for this Court to correct Missouri's departure from well-established federal law is all the greater because Missouri is a hotbed of FELA litigation. FELA has a liberal venue rule that allows plaintiffs great latitude in choosing the forum in which to sue, see 45 U.S.C. § 56, and even out-of-state plaintiffs flock to St. Louis because of its reputation as a pro-plaintiff jurisdiction where juries award (and judges uphold) very large verdicts. *Report Names Madison County The Top "Judicial Hellhole" In U.S.*, St. Louis Bus. J., Nov. 6, 2003, *available at* http://stlouis.bizjounals.com/stlouis/stories/2003/11/03/daily59.html (citing study that named Saint Louis City Court as the 11th-worst jurisdiction for defendants in the country); see *State ex rel. Linthicum* v. *Calvin*, 57 S.W.3d 855, 859 (Mo. 2001) (Wolff, J., concurring in part and dissenting in part); Tim Bryant, *Missouri Supreme Court Judge Suggests Mixing City, County Jury Pools*, St. Louis Post Dispatch, Nov. 27, 2002.[11]

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[11] These difficulties are exacerbated by the fact that Missouri courts routinely deny forum non conveniens motions. *See, e.g., Anglim* v. *Missouri Pac. R.R.*, 832 S.W.2d 298 (Mo. 1992) (plaintiff resided in Nebraska and injuries occurred in Omaha, Nebraska); *Besse* v. *Missouri Pac. R.R.*, 721 S.W.2d 740 (Mo. 1986) (plaintiff resided in Kansas and injuries occurred in Wichita, Kansas); *State ex rel. Kansas City S. Ry.* v. *Mauer*, 998 S.W.2d 185 (Mo. Ct. App. 1999) (plaintiff resided in Foreman, Arkansas, and injuries occurred in Arkansas); *Eutón* v. *Norfolk & W. Ry.*, 936 S.W.2d 146 (Mo. Ct. App. 1996) (plaintiff resided in Ohio and injuries occurred in Portsmouth, Ohio); *Robertson* v. *Burlington N. & Santa Fe R.R.*, 785 S.W.2d 626 (Mo. Ct. App. 1990) (plaintiff resided in Arkansas

This case illustrates forum shopping at its worst. The accident and injury occurred in Indiana, and the plaintiff was from Indiana. Yet suit was filed in St. Louis City Court. If jury instructions are more favorable in Missouri than in other courts, unseemly and unfair forum shopping will only increase.

For all of these reasons, this Court's review, or in the alternative summary reversal, plainly is warranted.

II. MISSOURI'S MANDATORY GENERAL-VERDICT RULE IS CONTRARY TO PRECEDENTS OF THIS COURT AND FEDERAL COURTS OF APPEALS, AND IMPERMISSIBLY DISCRIMINATES AGAINST FEDERAL RIGHTS.

The first error set forth above was exacerbated by the court's failure to require the jury to indicate (through jury instructions or a verdict form) whether it found Sorrell to have been contributorily negligent and if so, to what extent. See Instruction No. 14 (L.F. 26); Verdict B (Pet. App. 26a). The Missouri rule that mandates this practice makes it impossible for courts to superintend defendants' statutory right to a reduction in damages for contributory negligence, in violation of FELA.

The lower courts' refusal to require the jury to specify its apportionment of damages resulted from the use of MAI 8.02, which applies exclusively to cases arising under FELA, and MAI 36.01, a general verdict form that could not be used in any comparative-fault case in Missouri other than one concerning FELA. (As discussed below, see *infra* at 22, the instructions and verdict form for every other personal injury case involving comparative negligence in Missouri are differ-

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and injuries occurred in Ft. Smith, Arkansas); *Melton* v. *Illinois Cent. Gulf R.R.*, 763 S.W.2d 321 (Mo. Ct. App. 1988) (plaintiff resided in Centralia, Illinois, and injuries occurred near Benton, Illinois); *Ingle* v. *Illinois Cent. Gulf R.R.*, 608 S.W.2d 76 (Mo. Ct. App. 1980) (plaintiff resided in Alabama and injuries occurred in Tuscaloosa, Alabama).

ent.) Pursuant to the FELA-specific instructions, the jury determines the percentage of fault attributable to the plaintiff and uses that percentage to offset damages (as FELA requires, see 45 U.S.C § 53), but does not specify on the verdict form whether it found contributory negligence, and if so, the percentage of fault that it attributes to the respective parties. Rather, the jury determines on its own how the gross damages should be reduced in proportion to the employee's negligence, and declares only the resulting, final figure on the verdict form.

As a practical matter, this means that in FELA cases in Missouri, the parties and the courts are unable to evaluate the jury's decision regarding contributory negligence. It is impossible to determine:

- Whether the jury found contributory negligence;
- If the jury did find negligence, in what proportion it apportioned fault between the plaintiff and the railroad defendant;
- Whether the procedure for FELA fault calculation, mandated by federal law, was followed; and
- Whether the jury made a mathematical mistake in reaching its calculation.

Post-trial review of jury verdicts under this scheme (for instance, to determine if a verdict is excessive or against the weight of the evidence) is simply rendered impossible.

1. The Missouri rule conflicts with the precedent of this Court and multiple lower courts. As noted above, in FELA cases in Missouri where contributory negligence is at issue, the jury *must* enter a general verdict. See MAI 8.02 (Pet. App. 35a). The official commentary to Missouri's jury instruction states that FELA requires that "the *jury* diminishes damages in proportion to the employee's negligence." MAI 8.02 comm. cmt. That is, it interprets FELA to mean that not only is the jury the decisionmaker for contributory negligence

under FELA; but it also must perform the relevant calculations, and it must do so in a fashion that cannot be reviewed by either the trial judge or an appellate court.

The premise of the MAI—that FELA requires jury application of statutory requirements that are undisclosed and immune from trial or appellate court review—has no basis in federal law. To be sure, under FELA, whether there was contributory negligence and the allocation of percentage of total negligence to the employee are matters of fact for the jury. 45 U.S.C. § 53. But, whether the jury properly applied the law governing the allocation of damages is for the court, not the jury.

The right under FELA to a proper allocation of damages to contributory negligence, plainly conferred by the statute, was recognized by this Court in *Norfolk & W. Ry. Co.* v. *Earnest*, 229 U.S. 114 (1913). In that case, the Court held that the jury must compare the contributory negligence to total causal negligence, not just to the defendant's negligence. *Id.* at 121-22. Yet, the right to lawful allocation of damages under FELA is frustrated by the Missouri rule, which makes it practically impossible to determine whether a jury found contributory negligence; if so, to what extent; and whether the jury properly diminished the plaintiff's damages.

Nor, in any case where there is a submissible issue on contributory negligence, can the statutory right to offset be vindicated by the usual expedient of reversing a general verdict. In most cases, it will be impossible even to determine whether a statutory violation has occurred (for instance, whether the jury miscalculated the reduction for contributory negligence). And, even if it were possible, sending a case back for retrial would do no good because under the Missouri rule, another general verdict would result. Under the Missouri rule, defendants cannot determine whether their statutory rights were violated, and trial courts on post-trial review, as well as appellate courts, cannot meaningfully superintend the jury's decisionmaking.

Missouri's mandatory general-verdict rule has no warrant in federal law, and the court below once again offered no justification for its decision other than that the MAI requires it. Pet. App. 17a-18a. But, as explained above, *Dickerson* holds that the Missouri Approved Instructions may not be used to frustrate federal rights under FELA. 470 U.S. at 411; accord *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952) ("State laws are not controlling in determining what the incidents of th[e] federal right [under FELA] shall be."). This rule is simply one specific application of the venerable principle that "federal right[s] cannot be defeated by the forms of local practice." *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294, 296 (1950); *American Ry. Expr. Co.* v. *Levee*, 263 U.S. 19, 21 (1923) ("The law of the United States cannot be evaded by the forms of local practice."); *Atlantic Coast Line R.R.* v. *Mims*, 242 U.S. 532, 536 (1917).

Missouri's mandatory general-verdict rule also is in conflict with the rule of various courts of appeals, which admonish trial courts to use special verdict forms to enable proper judicial review of jury comparative negligence determinations under FELA. See, *e.g.*, *Blue v. Western Ry. of Ala.*, 469 F.2d 487, 497 (5th Cir. 1972) ("We have no way of knowing to what extent the jury reduced its award for Blue on the basis of a finding of Blue's contributory negligence. Such a situation would and should have been avoided through the use of special interrogatories under Rule 49, Federal Rules of Civil Procedure."); *Koivunen* v. *State Line*, 371 F.2d 781, 783 (9th Cir. 1967); *Flener* v. *Louisville & Nashville Ry.*, 198 F.2d 77, 79 (7th Cir. 1952); *Wetherbee* v. *Elgin, Joliet & E. Ry.*, 191 F.2d 302, 310 (7th Cir. 1951). These cases indicate that a party should not be denied an appropriate special verdict form when, as in this case, such a form is necessary to vindicate the plaintiff's federal rights under FELA.[12]

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[12] Multiple appellate court decisions discuss the percentage by which a FELA plaintiff's damages were reduced on account of contributory negligence, information that is available to the appellate court only if, contrary

Moreover, unlike the MAI, the pattern jury instructions in four federal circuits (including the Eighth Circuit) require the jury in FELA cases to specify the plaintiff's percentage of contributory negligence. See *Pattern Jury Instructions [Civil] for the Fifth Circuit* § 5.1 (1999); *Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit* § 7.08; *Ninth Circuit Manual of Model Civil Jury Instructions* § 8.7 (2004) ("You must then write th[e] percentage [of the plaintiff's contributory negligence] on the appropriate place on the verdict form. *Do not make any reduction in the amount of damages that you award to the plaintiff. I will reduce the damages that you award by the percentage of negligence that you assign to the plaintiff.*" (emphasis added)); *Eleventh Circuit Pattern Jury Instructions (Civil Cases)* § 7.1 & Special Interrogatories (1999). The wooden MAI rules upheld by the court below have no basis in FELA and frustrate uniformity in the administration of federal law.

2. What makes the Missouri court's refusal to require juries to specify the comparative fault of the parties particularly outrageous is that this practice discriminates against FELA defendants. MAI has an entire chapter (Chapter 37) devoted to comparative fault cases, a damages instruction that tells the

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to the Missouri rule, the jury instructions and jury verdict require an enumeration of damages. These decisions—which arise out of courts in the Second, Third, Fifth, Seventh and Eighth Circuits—demonstrate further adherence to the majority rule, not the Missouri rule. *See Schadel* v. *Iowa Interstate R.R.*, 381 F.3d 671, 673 (7th Cir. 2004) (affirming a district court's decision where plaintiffs' damages were reduced by 50% for a finding of contributory negligence); *Fashauer*, 57 F.3d at 1273 (upholding the reduction of plaintiffs' damages by 50% based on the jury's finding of contributory negligence under FELA); *Stanislawski* v. *Upper River Servs., Inc.*, 6 F.3d 537, 540-41 (8th Cir. 1993) (examining a 75% reduction of damages in a Jones Act claim as a result of the jury's finding of contributory negligence on the part of plaintiff); *Akermanis* v. *Sea-Land Serv., Inc.*, 688 F.2d 898, 906-07 (2d Cir. 1982) (reversing and remanding a decision by a trial court to order a new trial based solely on the percent of damages attributable to plaintiffs' negligence without disturbing trial court's decision to reduce plaintiff's damages by that amount).

jury to write out the percentages of fault (MAI 37.03), and a specific verdict form for use in comparative fault cases (MAI 37.07) (Pet. App. 37a). Yet, none of these principles applies to FELA cases, in which the FELA-specific rule concerning general verdicts is applied. Pet. App. 17a; see MAI 8.02 (Pet. App. 35a). There is no rational basis for Missouri to grant special verdicts to parties under state comparative negligence laws, but deny them to FELA defendants. *USDA* v. *Moreno*, 413 U.S. 528, 534 (1973). This Court has adopted the rule that "[a] state may not discriminate against rights arising under federal law" in its FELA jurisprudence, *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230 (1934), and this Court should reaffirm that rule here.

* * * *

The MAI that are binding in Missouri state courts in FELA cases defeat rational administration of federal law; prevent courts from conforming to the congressional directive to apply the common law "'as established and applied in the federal courts,'" *Urie*, 337 U.S. at 174; and draw the Missouri courts into sharp conflict with the precedents of this Court and of the federal courts of appeals. This Court should correct the Missouri court's negation of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court may wish to consider summarily reversing the decision below.

Respectfully submitted,

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December 7, 2005

APPENDICES

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. ED84268

TIMOTHY SORRELL,
Respondent,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Joan M. Burger

Filed: July 5, 2005

Before George W. Draper III, C.J. and Kathianne Knaup Crane and Robert G. Dowd, Jr., JJ.

ORDER

PER CURIAM.

Timothy Sorrell (Sorrell) brought suit under the Federal Employer's Liability Act (FELA), 45 U.S.C.A. Section 51, *et seq*, against Norfolk Southern Railway (Norfolk). The trial court entered judgment in favor of Sorrell pursuant to a jury verdict of $1,500,000.00. Norfolk appeals the judgment asserting seven claims of error.

We have reviewed the briefs of the parties and the record on appeal and find the claims of error to be without merit. An

opinion reciting the detailed facts and restating principles of law would have no precedential value. However, the parties have been furnished with a memorandum for their information only, setting forth the reasons for this order. The judgment is affirmed in accordance with Rule 84.16(b).

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. ED84268

TIMOTHY SORRELL,
Respondent,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant.

Appeal from the Circuit Court of the City of St. Louis

Hon. Joan M. Burger

Filed: July 5, 2005

Before George W. Draper III, C.J. and Kathianne Knaup Crane and Robert G. Dowd, Jr., JJ.

MEMORANDUM SUPPLEMENTING ORDER AFFIRMING JUDGMENT PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for our order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Timothy Sorrell (Sorrell) brought suit under the Federal Employer's Liability Act (FELA), 45 U.S.C.A. Section 51, *et seq*, against Norfolk Southern Railway (Norfolk). The trial court entered judgment in favor of Sorrell pursuant to a jury verdict of $1,500,000.00. Norfolk appeals the judgment asserting seven claims of error. Finding no trial court error, we affirm the judgment.

Viewed in the light most favorable to the verdict, the following evidence was presented at trial. Sorrell worked as a trackman for Norfolk for twenty-seven years. On November 1, 1999, Sorrell was driving a dump truck owned by Norfolk on a county road in Kendallville, Indiana heading east toward the top of a hill. A second truck owned by Norfolk, driven by a Norfolk employee, was heading west toward Sorrell. The second truck did not noticeably slow down. Sorrell pulled as far to the side of the road as he could. As soon as the second truck passed, Sorrell tried to pull back onto the road and his truck slipped. The truck dropped down into a ditch and rolled over.

Sorrell suffered injuries to his back and neck. Sorrell did not return to work after November 1, 1999. Sorrell saw Dr. Stephen Ribaudo, an Indiana physician, from November 1999 to March 2000. In June 2001, Sorrell saw Dr. George Schoedinger, a Missouri physician who practices in St. Louis County, who determined Sorrell had ruptured disks in his neck and operated on Sorrell.

Sometime between October 2002 and December 2002, Dr. Schoedinger concluded Sorrell had reached maximum medical recovery. Dr. Schoedinger found that Sorrell could only do "light" physical demand work.

Norfolk provided health insurance for Sorrell. Sorrell's plan covered both he and his wife, who suffers from multiple sclerosis. Sorrell and his wife's health insurance through Sorrell's employment with Norfolk ended in December 2001.

Sorrell has not been employed since the November 1, 1999 injuries.

Sorrell brought suit against Norfolk under FELA for damages resulting from the injuries he suffered in the November 1, 1999 accident while working for Norfolk. The jury returned a verdict for Sorrell in the amount of $1,500,000.00, and the trial court entered judgment upon the jury's verdict.[1] Norfolk now appeals.

In its first point, Norfolk contends the trial court erred in giving Instruction No. 13, an affirmative defense instruction for FELA cases that was based on MAI 32.07(B). Norfolk contends MAI 32.07(B) misstates the causation standard for contributory negligence in a FELA case because MAI 32.07(B) instructs the jury to find the plaintiff negligent only if it concludes that his negligence "directly contributed to cause his injury" rather than caused his injury "in whole or in part," consistent with the verdict directing instruction for FELA cases contained in MAI 24.01. We disagree.

At trial, the trial court gave the following instruction, Instruction No. 13, patterned after MAI 32.07(B)[2]:

> You must find plaintiff contributorily negligent on his November 1, 1999 injury claim if you believe:

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[1] Plaintiff requested the jury to award him a total of $2,500,000.00 in damages.

[2] MAI 32.07(B), entitled Affirmative Defenses—Contributory Negligence—F.E.L.A., provides:

> You must find plaintiff contributorily negligent if you believe:
>
> First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and
>
> Second, plaintiff was thereby negligent, and
>
> Third, such negligence of plaintiff directly contributed to cause his injury.

(Footnotes omitted)

First, plaintiff either:

failed to stop his truck, or

failed to keep his truck on the roadway, and

Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

Norfolk also tendered an alternative modified instruction, Instruction No. A, on contributory negligence. In that instruction, Norfolk submitted the causation standard for Sorrell's contributory negligence as "negligence of plaintiff contributed in whole or in part to cause his injury." Norfolk based the causation standard in Instruction No. A on MAI 24.01, the verdict directing instruction in a FELA case for failure to provide a safe place to work.[3] The trial court rejected Norfolk's modified verdict directing instruction for contributory negli-

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[3] MAI 24.01 provides:

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and

Second, [with respect to such conditions for work,] defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe appliances, or

reasonably safe methods of work, or

reasonably adequate help, and

Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent, and

Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (decedent's name)].

(Footnotes omitted.)

gence and submitted Instruction No. 13 patterned after MAI 32.07(8).

Norfolk contends that in a FELA case where contributory negligence is an issue, the causation standard should be the same as to the plaintiff and the defendant. However, Rule 70.02(b) provides that whenever "Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject." Here, the instruction patterned after MAI 32.07(B) was the correct instruction. MAI 32.07(B) has been determined to be the applicable instruction in cases such as the present case. Thus, we cannot convict the trial court of error in giving the applicable MAI as determined by the Supreme Court of Missouri. Point denied.

In its second point, Norfolk argues the trial court erred in admitting the expert testimony of Kevin Guss and evidence regarding the "replacement cost" of health insurance for Sorrell and his wife. We disagree.

We give substantial deference to a trial court's ruling regarding the admissibility of evidence and will not overturn such a decision unless the trial court abused its discretion. *Leake v. Burlington Northern R. Co.*, 892 S.W.2d 359, 362 (Mo. App. E.D. 1995). We presume discretionary rulings of a trial court are correct. *Id.* However, a trial court abuses its discretion when a ruling shock one's sense of justice, indicates a lack of consideration, and is clearly against the logic of the circumstances. *Id.*

At the trial, over Norfolk's objection, Sorrell offered the testimony of Kevin Guss, an insurance broker, to support his claim for damages attributable to the loss of the fringe benefit of health insurance. Guss testified that he could not find a replacement plan that would provide exactly the same benefits as those available through Sorrell's employment with

Norfolk. Guss explained that with Sorrell's preexisting conditions and his wife's multiple sclerosis it would be impossible to find private insurance coverage. Guss testified that the only insurance coverage Sorrell and his wife would qualify for was through the Indiana Comprehensive Health Insurance Association, which was a pool plan funded by all health insurers doing business in Indiana and offered to Indiana residents who cannot get insurance elsewhere. Guss explained that this insurance coverage would not be as good as the insurance coverage provided by Norfolk. Guss stated that to obtain coverage through this plan, Sorrell would have to pay a total of $165,389.45 for himself and $198,503.84 for his wife in monthly premiums through age sixty-four.[4]

Norfolk contends the evidence of the replacement cost of health insurance should not have been admitted because (1) Sorrell cannot recover damages for his wife's loss of health insurance, (2) replacement cost is not a proper measure of damages where FELA only permits recovery of actual pecuniary losses, (3) the claim for replacement cost was not reasonably certain, and (4) Kevin Guss's testimony lacked an adequate factual foundation.

Norfolk first contends Sorrell cannot recover damages for his wife's loss of health insurance. Norfolk cites to two cases holding that under FELA a spouse has no right to recover for loss of consortium as a result of employee's injuries. *See Dixon v. CSX Transp.. Inc.*, 990 F.2d 1440, 1442-43 (4th Cir. 1993); *Kelsaw v. Union Pacific Railroad Co.*, 686 F.2d 819, 820-21 (9th Cir. 1982). We find these cases inapposite to the present case. Here, Sorrell's wife did not file a separate loss of consortium claim. A loss of consortium claim is a separate, derivative action brought by an injured person's spouse for loss of the injured person's services, society, companionship, and sexual relations. *O'Neal v. Agee*, 8 S.W.3d 238, 242 (Mo.

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[4] At the time of the trial , Sorrel was forty-seven years old.

App. E.D. 1999). The action here was brought by Sorrell as an injured employee of Norfolk seeking damages for that injury and those damages include the loss of his fringe benefit of family health insurance which provides medical coverage for Sorrell's wife. The loss of an employee's stream of income comprises several elements, the most significant of which is the actual wage. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 534 (1984). In addition, the worker may have enjoyed certain fringe benefits which should be included in the evaluation of a worker's loss. *Id.*; *Maylie v. National Railroad Passenger Corp.*, 791 F.Supp. 477, 487-88 (1992). These fringe benefits include insurance coverage, pension and retirement plans, profit sharing, and in-kind services. *Jones & Laughlin Steel Corp.*, 462 U.S. at 534 n. 12. Here, Sorrell not only lost his wages but also his family health insurance and the value of that benefit is recoverable. There is no loss of consortium claim and Norfolk's argument is without merit.

Norfolk next contends the testimony concerning replacement costs of Sorrell and his wife's insurance was inadmissible because replacement costs are not the appropriate measure of damages where FELA only permits recovery of actual pecuniary losses. However, under these facts, we need not decide the issue of appropriate measure of damages for loss of fringe benefits.[5] Here, the trial court determined the evidence of replacement costs was relevant to the jury's calculation of damages. The evidence of replacement costs was not offered as the measure of damages, but as relevant evidence of how much it would cost Sorrell to replace health insurance

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[5] Moreover, if we were to accept Norfolk's position that in order to recover the cost of replacement health insurance, the plaintiff must actually purchased insurance, we believe it would disadvantage those who cannot afford to pay insurance premiums following the loss of employment. *See EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 902 (9th Cir. 1994.)

for himself and his wife. The ultimate test for damages is whether the award will fairly and reasonably compensate the plaintiff for his injuries. *Anderson v. Burlington Northern Ry. Co.*, 700 S.W.2d 469, 476 (Mo. App. E.D. 1985). Here, the evidence of replacement costs for health insurance for Sorrell and his wife was relevant to the jury's determination of what would fairly and reasonably compensate Sorrell for his injuries.

Norfolk also argues the claim for replacement cost was not reasonably certain and thus, the evidence of the replacement cost for Sorrell's family health insurance should not have been admitted. We agree that future damages are not compensable unless they are reasonably certain to occur. *Hobbs v. Harken*, 969 S.W.2d 318, 323 (Mo. App. W.D. 1998). The law requires that the evidence introduced must lay a foundation to enable the jury to make a fair and reasonable estimate of future damages and may not rest upon speculation. *Id.* Rather, future damages must be proved with reasonable certainty. *Id* "[R]easonable certainty contemplates and demands something more than a showing of contingent or speculative occurrences, possible or even probable developments, or conjecture, likelihood and probability." *Id.* (*quoting Thienes v. Harlin Fruit Co.*, 499 S.W.2d 223, 230 (Mo. App. 1973) (internal citations omitted)).

Here, the evidence of Sorrell's future damages for the loss of his family health insurance coverage was reasonably certain. Sorrell's family health insurance coverage with Norfolk expired. Sorrell was unemployed at the time of the trial. Sorrell does not have either a high school education or a GED. Other than his twenty-seven years with the railroads, Sorrell's employment experience consists of two and one-half years in the Navy and one year as a fireman. Both Sorrell and his wife have preexisting conditions. Sorrell has two fused discs in his neck and a bad back. Sorrell's wife has multiple sclerosis.

After his injury, Norfolk told Sorrell he could not return to his job as a trackman. When Sorrell failed to pass the tests given through Norfolk's vocational rehabilitation program, Norfolk told him that the railroad had no job for him. Sorrell has looked for work since his surgeon released him for "light work" in December 2002. Although Sorrell testified he was confident he would find a job, most of the jobs available to Sorrell were low-paying, unskilled jobs. There was no evidence as to any type of family health insurance coverage that could be provided from any potential employer.

Considering Sorrell's age, background, education level, and physical condition it is not speculative to find that he is reasonably certain to suffer future damage in the form of replacement costs for insurance. We believe the evidence shows it would in fact be more speculative to conclude Sorrell has a chance to find employment comparable to his employment at Norfolk prior to the injury given his circumstances. Under these facts, we find that a reasonable juror could find that it is a reasonable certainty that Sorrell will suffer future family health insurance replacement costs.

Finally, Norfolk claims Kevin Guss's testimony lacked an adequate factual foundation and should not have been admitted. Norfolk cites to three cases where it was determined that expert testimony concerning future damages was inadmissible because the evidence lacked an adequate foundation. *See Greer v. Continental Gaming Co.*, 5 S.W.3d 559 (Mo. App. W.D. 1999), *Hobbs*, 969 S.W.2d at 318, and *First National Bank of Fort Smith v. Kansas City Southern Ry. Co.*, 865 S.W.2d 719 (Mo. App. W.D. 1993). In *Greer*, an economist based his calculations upon the assumption that the plaintiff "would not be able to work for the next five or ten years, and would be unable to perform household services for the rest of her life." *Greer*, 5 S.W.3d at 566. The court found there was no evidentiary support for the assumptions made by the economist where the doctors testified that the plaintiff would

be able to work if she had her knee replaced and the plaintiff testified that she intended to have a knee replacement. *Id.*

In *Hobbs*, an economist relied on the representations of the plaintiff's counsel that the plaintiff's doctor would testify that the plaintiff's vestibular disorder would remain unchanged for twenty years when making his calculations for future lost earnings. *Hobbs*, 969 S.W.2d at 324-25. The court found the testimony was not supported by the evidence when the doctor actually testified that the plaintiff's condition "would improve or disappear with therapy and, perhaps, ultimately, with surgery." *Id.* at 325.

In *First National Bank of Fort Smith*, a "life care plan expert" testified that the plaintiff would need future attendant care at a cost of $1.8 million because the plaintiff would become a paraplegic or confined to a wheelchair. *First National Bank of Fort Smith*, 865 S.W.2d at 738. The court found the testimony was improperly admitted when there was no testimony that the plaintiff would become a paraplegic or be confined to a wheelchair. *Id*

We find these cases inapposite to the present case. Here, there was no testimony that Sorrell's position would change in such a manner to restore the fringe benefit of family health insurance coverage similar to that which was provided by Norfolk. With Sorrell's age, education level, and health condition, it is reasonably certain that he will suffer the loss of family health insurance. Thus, Kevin Guss's testimony of replacement costs was supported by a sufficient evidentiary foundation.

Because we find Sorrell can recover the damages for the loss of his family insurance benefits, the evidence of replacement costs presented at trial was relevant to the issue of Sorrell's damages, Sorrell's claim for replacement costs is reasonably certain, and there was a sufficient foundation for Guss's testimony, we must deny Norfolk's second point. Point denied.

In its third point, Norfolk asserts the trial court erred in excluding all evidence of Sorrell's wife's receipt of social security disability benefits and Medicare benefits. Norfolk contends the evidence of the benefits did not fall into the category of a collateral source, and, if the benefits were considered a collateral source, the evidence was admissible because Sorrell opened the door by presenting evidence of lack of health insurance. We disagree.

For the purpose of reducing or eliminating Sorrell's claim for damages for loss of the fringe benefit of family health insurance, Norfolk sought to cross-examine Sorrell's wife and Sorrell's health insurance broker to show that Sorrell's wife was receiving over $900.00 per month in social security disability benefits, and that some of her medical expenses were being paid by Medicare. The trial court refused to allow Norfolk to present such evidence because the evidence was inadmissible under the collateral source rule. The trial court specifically stated in making its ruling to exclude the evidence that "[a]s far as I know there is no evidence of their income or lack of income or how much income they have. And there is no evidence why they don't have medical insurance. If there had been something along that line my ruling would have changed."

Where evidence is excluded, the issue is whether or not the trial court abused its discretion, not whether the evidence was admissible. *Misischia v. St. John's Mercy Medical Ctr.*, 30 S.W.3d 848, 865 (Mo. App. E.D. 2000). A trial court abuses its discretion when the ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock one's sense of justice and indicates a lack of careful consideration. *Boyer v. Sinclair & Rush, Inc.*, 67 S.W.3d 627, 634 (Mo. App. E.D. 2002). We give substantial deference to the trial court's decision to admit or exclude evidence because of its superior opportunity to evaluate the proffered evidence in the context of the trial. *Misischia*, 30 S.W.3d at

865. We will affirm the trial court's evidentiary ruling unless there is a substantial or glaring injustice. *Uxa ex rel. Uxa v. Marconi*, 128 S.W.3d 121, 130 (Mo. App. E.D. 2003). To reverse, we must find that the trial court's error in excluding evidence was prejudicial and not harmless and that the error materially affected the merits of the action. *Whitworth v. Jones*, 41 S.W.3d 625, 627 (Mo. App. E.D. 2001). A ruling within the trial court's discretion is presumed correct, and the appellant bears the burden of showing abuse of discretion and prejudice. *Boyer*, 67 S.W.3d at 634.

Here, we cannot convict the trial court of error in excluding evidence of Sorrell's wife's receipt of social security disability benefits and Medicare. Without determining whether Sorrell's wife's receipt of social security disability benefits and Medicare fall within the collateral source rule, we agree with the trial court that such evidence was not relevant to the loss of Plaintiff's fringe benefit of family health insurance. Sorrell was entitled to seek recovery for the loss of his fringe benefit of family health insurance and to seek the same level of coverage lost as a result of his injury while employed with Norfolk. Benefits received by Sorrell's wife could not be used to reduce his damages for the loss of his fringe benefits.

Moreover, even if Sorrell's wife's receipt of social security disability benefits and Medicare was considered to be a collateral source, we cannot say that Sorrell opened the door to allow the admission of the benefits evidence. Generally, the purpose of the collateral source rule is to prevent a wrongdoer from mitigating damages by proving that payments were made to a person from a collateral source. *Buatte v. Schnuck Markets, Inc.*, 98 S.W.3d 569, 573 (Mo. App. E.D. 2002). A plaintiff opens the door for the admission of such evidence, if the plaintiff injects his financial condition into the proceedings and implies financial distress, the defendant may rebut this by showing the plaintiff had other financial assistance available. *Moore v. Missouri Pacific R. Co.*, 825 S.W.2d 839,

843 (Mo. banc 1992). Here, there was no direct evidence that Sorrell's wife did not have insurance at the time of trial. The testimony alluded to by Norfolk did not open the door for the admission of the evidence. Both Sorrell and his wife testified that their health insurance through Norfolk had expired. This evidence was relevant in proving Sorrell's claim for loss of his fringe benefit of family health insurance. The testimony does not directly relate to their present financial condition concerning health insurance or imply financial distress. Furthermore, while Sorrell did testify that he did not have health insurance at the time of the trial, this did not open the door to the fact that his wife was receiving social security disability benefits and Medicare. Moreover, counsel for Norfolk, when questioning Kevin Guss, directly asked whether the Sorrells had insurance coverage at the time of the trial, to which Kevin Guss responded that he did not know their situation at that time. While Kevin Guss did not specifically say that the Sorrells were not covered by health insurance at the time of the trial, this questioning was initiated by Norfolk. Therefore, Sorrell cannot be charged with opening the door to the introduction of such evidence.

Finally, Norfolk directs this court to statements made by Sorrell's counsel in his closing argument where he said the Sorrells had been "cut off" from health insurance and that "[t]hey don't have health insurance." However, statements made in closing arguments are not deemed evidence, *Rudin v. Parkway School Dist.*, 30 S.W.3d 838, 842 (Mo. App. E.D. 2000), and should not be considered to determine whether a plaintiff has opened the door to the admission of inadmissible evidence. The trial court did not abuse its discretion in excluding evidence that Sorrell's wife received social security disability benefits and Medicare benefits. Point denied.

In its fourth point, Norfolk claims the trial court erred in excluding evidence of Sorrell's receipt of $1,800.00-$1,900.00 per month in railroad disability benefits. Norfolk contends

Sorrell opened the door for the evidence by testifying that he and his wife had no health insurance and no means to pay medical costs. We disagree.

During pre-trial proceedings in *limine*, the trial court instructed Norfolk not to raise any issues regarding Sorrell's receipt of disability benefits. At the trial, Norfolk made an offer of proof, questioning Sorrell outside the hearing of the jury. Sorrell testified that he received Railroad Retirement disability benefits of $1,800.00 to $1,900.00 per month since November of 2000. Norfolk explained that it wanted to offer this testimony to the jury to respond to Sorrell's claims for replacement cost of insurance benefits and to correct the impression given to the jury that Sorrell and his wife have no insurance coverage and no income. The trial court ruled the evidence was inadmissible under the collateral source rule.

The United States Supreme Court in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963), held evidence that the plaintiff is receiving disability payments under the Railroad Retirement Act is inadmissible. *Id.* at 254-55. The Court noted that those benefits "are not directly attributable to the contributions of the employer" and are "inadmissible to offset or mitigate damages." *Id.* at 254. In *Eichel*, the Court stated the likelihood of misuse by the jury clearly outweighed the value of such evidence. *Id.*

Again, the rule against collateral source in a FELA case is not absolute. If the plaintiff injects his financial condition into the proceedings and implies financial distress, the defendant may rebut this by showing the plaintiff had other financial assistance available. *Moore*, 825 S.W.2d at 843 (*citing Gladden v. P. Henderson & Co.*, 385 F.2d 480 (3rd Cir. 1967) and *Lange v. Missouri Pacific R.R. Co.*, 703 F.2d 322 (8th Cir. 1983)). The evidence of other financial assistance may be used for the narrow purpose of testing the credibility of the plaintiff's assertion regarding financial distress. *Leake*, 892 S.W.2d at 363.

Here, we find no statements injecting Sorrell's financial condition into the case so as to allow an opportunity of Norfolk to rebut with evidence of collateral source payments. Norfolk again claims Sorrell opened the door when he stated that he did not have health insurance coverage at the time of the trial. The statements alluded to by Norfolk do not imply any financial distress for the purpose of appealing to the jury's sympathy to increase the award of damages. *See Mateer v. Union Pacific Systems*, 873 S.W.2d 239, 245 (Mo. App. E.D. 1993). We find no abuse of discretion in excluding the evidence of collateral source payments. Point denied.

In its fifth point, Norfolk asserts the trial court erred in submitting Instruction No. 14 and Verdict Form B, based on MAI 8.02 and MAI 36.01. Norfolk contends that by not requiring the jury to make a specific finding as to each party's percentage of fault, the instructions violate Norfolk's due process and equal protections rights. Norfolk further claims that the instructions violate the Supremacy Clause and there is no rational basis for treating FELA verdicts differently from common law negligence claims. We disagree.

In most Missouri cases involving comparative fault, the jury is asked to determine a total amount of damages and the percentage of fault of the plaintiff and the defendant, and the jury is told that the judge will reduce the total damages awarded by the percentage of fault attributed to the plaintiff. *See* MAI 37.07. FELA, however, requires that the jury rather than the judge diminish the total damages by the comparative fault of the plaintiff. 45 U.S.C.A. Section 53. For this reason, the jury in FELA cases is instructed that after it determines the sum of damages to which it believes the plaintiff is entitled as a result of the defendant's conduct that "[i]f you find plaintiff contributorily negligent as submitted in Instruction Number ___, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff." MAI 8.02.

Here, Instruction No. 14, modeled after MAI 8.02, was submitted to the jury. The verdict form submitted was patterned after MAI 36.01, which is the verdict form for a plaintiff alleging personal injuries against a defendant. MAI 36.01 does not provide for assessment of percentages of fault to be listed on the verdict form in contrast to MAI 37.07 where the jury records its assessment of percentages of fault on the verdict form.

Norfolk maintains the distinction between how the jury records its damage verdict in FELA and non-FELA cases constitutes unconstitutional discrimination against FELA cases in violation of the Supremacy Clause. This identical issue was raised and denied in *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813 (Mo. banc 2000).

Norfolk also asserts due process and equal protection violations in that the parties and appellate courts have no means of determining whether the jury properly reduced total damages by plaintiff's fault or whether it correctly made mathematical computations in diminishing total damages by the amount of plaintiff's negligence.[6] Norfolk urges that this denies meaningful judicial review. Norfolk, however, has not provided this court with any authority convincing us of a constitutional dilemma in MAI 8.02 and MAI 36.01. Accordingly, Norfolk's constitutional arguments are rejected. We will not convict the trial court of error in submitting an instruction reproducing the required MAI as set forth by the Supreme Court of Missouri. Point denied.

In its sixth point, Norfolk contends the trial court erred in allowing Sorrell to present evidence that his wife suffers from multiple sclerosis. Norfolk maintains the nature of Sorrell's wife's medical condition was irrelevant and prejudicial. We disagree.

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[6] Identical claims were asserted in the *Giddens* case. The Court, however, declined to address these constitutional issues because they had not been properly preserved for appeal. *Giddens*, 29 S.W.3d at 823.

Initially, we note that when Sorrel was asked at trial if his wife had multiple sclerosis, Norfolk did not object. Furthermore, Sorrell's wife was present throughout the trial and testified from her wheelchair on Sorrell's behalf.

Norfolk cites to four cases to support its argument that evidence of Sorrell's wife's multiple sclerosis was irrelevant and highly prejudicial as an appeal to the sympathy of the jurors. *See Golian v. Stanley*, 334 S.W.2d 88, 91 (Mo. 1960) (evidence of number of members in plaintiff's family improper in personal injury actions); *Meade v. Kansas City Public Service Co.*, 250 S.W.2d 513, 515-16 (Mo. 1952) (evidence of number of members in plaintiff's family improper in personal injury actions); *Minneapolis, St. P. & S.S.M. Ry. Co. v. Moquin*, 283 U.S. 520, 521 (1931) (reversing a FELA verdict where it appeared the verdict was based on emotional appeals to jurors); and *Chicago, St. P., & M. & 0. R. Co.*, 160 F.2d 1002, 1008 (8th Cir. 1948)(improper statements regarding action of the railroad to appeal to the sympathy of the jury).

We are not persuaded, under any of the cases cited by Norfolk, that the trial court abused its discretion in allowing evidence of Sorrell's wife's condition. Here, the evidence of Sorrell's wife's multiple sclerosis was relevant to the loss of Sorrell's fringe benefit of health insurance and outweighs any possible prejudice. We cannot say the trial court abused its discretion in allowing the evidence to be presented to the jury. Point denied.

In its seventh and final point, Norfolk argues the trial court erred in denying its motion to dismiss for forum non conveniens. Norfolk maintains there was no nexus between Sorrell, an Indiana resident, and his accident in Indiana and the City of St. Louis. Norfolk contends the City of St. Louis was not the appropriate place to have this trial pointing out that the accident occurred in Kendallville, Indiana, which is 317 miles from the City of St. Louis, only two witnesses, including

Sorrell's treating orthopedic surgeon, Dr. Schoedinger, were Missouri residents, and Sorrell is a resident of Indiana and Norfolk is headquartered in Virginia. We disagree.

Norfolk, however, failed to include this claim of error in its motion for new trial. Allegations of error, including the denial of a motion to dismiss for *forum non conveniens*, must be included in a motion for new trial in order to be preserved for appellate review. Rule 78.07. Thus, we review for plain error only. Rule 84.13(c).

The doctrine of *forum non conveniens* is designed to prevent a plaintiff from using a venue statute to vex, oppress, or harass a defendant by bringing a suit in a forum unrelated to the parties or the cause of action. *Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298, 302 (Mo. banc 1992). However, a plaintiff's choice of forum is not to be disturbed except for "weighty reasons" and the case should be dismissed only if the "balance is strongly in favor" of the defendant. *Id.*

In determining whether to apply the doctrine on *forum non conveniens* in a given case, trial courts are guided by six primary factors: (1) place of accrual of the cause of action; (2) location of the witnesses; (3) the residence of the parties; (4) any nexus with the place of the suit; (5) the public factor of the convenience to and burden upon the court; and (6) the availability to the plaintiff of another court with jurisdiction of the cause of action affording a forum for the plaintiff's remedy. *Anglim*, 832 S.W.2d at 302. Because the application of the doctrine of *forum non conveniens* is fact intensive and the weight to be accorded any factor is dependent on the circumstances, trial court discretion is essential. *Id.* at 303. In determining whether the trial court's ruling amounted to an abuse of discretion, only those facts will be considered that were before the trial court when it ruled on the motion to dismiss, and the evidence will be viewed in a light favorable to the result of the trial court. *Id.* On appeal, discretionary

rulings are presumed correct, and the appellant bears burden of showing an abuse of discretion. *Id*

Here, the trial court made a specific finding that "[Norfolk] has failed to show that a trial of this case in St. Louis, will result in such oppression that [Sorrell's] choice of forum should be disregarded" Norfolk has not overcome this ruling and failed to meet its burden of showing the trial court abused its discretion. Moreover, the fact that Sorrell's treating physician practiced in St. Louis and that Norfolk engaged as a common carrier in Missouri provides a sufficient nexus to the City of St. Louis. *See Euton v. Norfolk & Western Ry. Co.*, 936 S.W.2d 146, 154 (Mo. App. E.D. 1996)(the fact that plaintiff's treating physician practiced in St. Louis and that the railroad engaged as a common carrier in Missouri provided a sufficient nexus to Missouri, even where most of the events took place outside of Missouri). We find no error, plain or otherwise. Point denied.

The judgment is affirmed.

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APPENDIX B

STATE OF MISSOURI } SS
CITY OF ST. LOUIS }

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

FILED

NOV 0 7 2003

MARIANO V. FAVAZZA
CIRCUIT CLERK
BY DEPUTY CLERK

Timothy Sorrell

Plaintiff(s),

vs.

Norfolk Southern Railway Company

Defendant(s).

Cause No. 012-8583

Division No. 13

JUDGMENT

This action came before this Court and a Jury. The parties appeared in person and by their respective attorneys. The issues have been duly tried and the Jury rendered its verdict(s).

VERDICT A

Whereas, on the claim of Tim Sorrell (Plaintiff/Defendant) for the October 20, 1999 injury against Norfolk Southern Railway Company (Plaintiff/Defendant) [the Jury found in favor of the (Plaintiff), (Defendant)] (and/or) [the Jury assessed the percentages of fault as follows:]

_____ _____%

_____ _____%

_____ _____%

_____ _____%

_____ _____%

100%

The Jury found the total damages of (Plaintiff) (Defendant), disregarding any fault on the part of (Plaintiff), (Defendant), to be $ _____ Dollars and _____ Cents.

WHEREFORE, it is hereby ordered and adjudged that _____

_____

have and recover of:

_____ $ _____

_____ $ _____

_____ $ _____

_____ $ _____

_____ $ _____

VERDICT B

Whereas, on the claim of Tim Sickels for
Plaintiff/Defendant
the November 6, 1999 injury against
Norfolk Southern Railway Company [the Jury found in
Plaintiff/Defendant
favor of the (Plaintiff), (Defendant)] (and/or) [the Jury assessed the percentages of fault as follows:]

_____ _____%

_____ _____%

_____ _____%

_____ _____%

_____ _____%

100%

The Jury found the total damages of (Plaintiff) (Defendant), disregarding any fault on the part of (Plaintiff), (Defendant), to be $ 1,500,220 Dollars and 00 Cents.

WHEREFORE, it is hereby ordered and adjudged that Plaintiff Timothy Sawell

have and recover of:

Defendant Norfolk Southern Ry. Co.	$ 1,500,000.00
	$
	$
	$
	$

[Cost of this action to be taxed against the (Plaintiff(s)), (Defendant(s)) or (Apportioned)].

44931
Attorney for Plaintiff, Bar#
100 South Fourth Street Suite 900
Address St Louis, MO 63102
314-621-6115
Phone #

44596
Attorney for Defendant, Bar#
One US Bank Plaza, Suite 2400
Address
314 552-6000
Phone #

SEAL of the CIRCUIT COURT

SO ORDERED:

James M Bruggers
Judge, Division No. 13
Judge No. 24764

IN TESTIMONY WHEREOF, I Have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, this 7 day of November, 2003

MARIANO V. FAVAZZA
Circuit Clerk
By: V. Payne
Deputy Clerk

[ ] see attached supplemental judgment form(s) which is/are made a part hereto.

APPENDIX C

VERDICT A

Note: Complete this form by writing in the name required by your verdict.

On the October 20, 1999 claim of plaintiff Timothy Sorrell for personal injuries against defendant Norfolk Southern Railway Company, we, the undersigned jurors, find in favor of:

Timothy Sorrell (Plaintiff Timothy Sorrell) or _____ (Defendant Norfolk Southern Railway Company

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Timothy Sorrell.

We, the undersigned jurors, assess the damages of plaintiff Timothy Sorrell at

$ — 0 —

FILED
NOV 07 2003
MARIANO V. FAVAZZA
CIRCUIT CLERK
BY DEPUTY CLERK

Note: All jurors who agree to the above findings must sign below.

VERDICT B

Note: Complete this form by writing in the name required by your verdict.

On the November 1, 1999 claim of plaintiff Timothy Sorrell for personal injuries against defendant Norfolk Southern Railway Company, we, the undersigned jurors, find in favor of:

Timothy Sorrell
(Plaintiff Timothy Sorrell) or _____ (Defendant Norfolk Southern Railway Company)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Timothy Sorrell.

We, the undersigned jurors, assess the damages of plaintiff Timothy Sorrell at

$ 1,500,000.00

FILED
NOV 0 7 2003
MARIANO V. FAVAZZA
CIRCUIT CLERK
BY DEPUTY CLERK

Note: All jurors who agree to the above findings must sign below.

Elizabeth Bragg
James Mund
James Haggerty
Julie Ridley
Richard Crafton
Beverly Harris
Anita Bryant
Jacqueline M. Powell

APPENDIX D

IN THE EASTERN DISTRICT COURT OF APPEALS
CITY OF ST. LOUIS

Cause No. 012-8583

TIM SORRELL,
Plaintiff-Respondent,
vs.
NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellant.

Before the Honorable Joan M. Burger

TRANSCRIPT ON APPEAL
November 3-7, 2003

Attorney for Plaintiff:
Paul Slocomb,
Attorney at Law

Attorneys for Defendant:
David Dick,
Tom Alvey,
Attorneys at Law

Joanne J. Martin #169
Official Court Reporter
22nd Judicial Circuit

* * * *

[574] MR. SLOCOMB: None for plaintiff.

MR. DICK: Judge, I do have some non-M.A.I. instructions to tender.

Defendant tenders these understanding that they're not M.A.I. instructions, but in order to preserve the record on the issues.

The first of those, Judge, is—we'll tender as Instruction A—

THE COURT: Uh-huh.

MR. DICK:—and that is, Judge—and, Judge, how this does not conform to M.A.I., it tracks 32.07(B), the comparative fault instruction, with the exception of paragraph third.

THE COURT: In whole or in part.

MR. DICK: Yes. M.A.I. approved 32.07(B), paragraph third, modified in light of language of 45 U.S.C. Sections 51 and 53 FELA pure comparative fault system.

This gives basically the causation of standard negligence of plaintiff directly contributing to his injury.

Instruction A that we have tendered says, "Third, such negligence of plaintiff contributed in whole or in part to cause his injury."

We believe this alternative instruction [575] should be used in that this M.A.I. is an incorrect statement of law under FELA, Sections, 45 United States Code, 51 and 53.

Section 51 does refer to the in whole or in part standard. Section 53 refers to comparative fault of the plaintiff and the statutory system.

There are enumerable cases in the Statutes that refer to it, a pure comparative fault system.

And I think the current M.A.I. instruction has a different causation standard for comparative fault, meaning that under 32.07 we must prove that such negligence of plaintiff directly contributed to cause the injury.

I believe that misstates the law because that is a different standard.

This instruction requires the defendant to prove in a comparative fault case that comparative fault directly contributed to cause the injury, which I believe is a much more

exacting standard than in whole or in part, which is what the plaintiff's verdict director states.

For those reasons I stated and looking at the language of the Statutes on the comparative fault system, we believe 32.07 misleads the, or misstates the law.

[576] THE COURT: The Court refuses to give that instruction since it's not in M.A.I.

I would suggest you bring case law and Statutes before the Jury Instruction Committee of the Supreme Court on this issue.

MR. DICK: Then our other issue, Judge, our other non-M.A.I. instruction is a Constitutional objection.

We may have a pleading to file with the Court. Again, this is a series of non-M.A.I. instructions.

We understand are not M.A.I. instructions. We're filing this pleading to make clear for the record the basis of our Constitutional objection under the Equal Protection Clause of the Fifth Amendment of the United States Constitution as incorporated against the States in the Fourteenth Amendment and the Supremacy Clause in the United States Constitution. All of this is referred to in our memo.

And, Judge, the explanation of the basis of our objection is that the Missouri system of instructing the jury in FELA cases requires the jury to make comparative fault determinations without writing then on a verdict form.

[577] It requires them to do the comparative fault and make their comparative fault reduction in their heads and never ever commit it to paper.

And we believe, as stated in our brief, which I won't read the whole thing, it's eight pages long, we believe that system is unconstitutional for the reasons stated, because it treats railroads and FELA cases differently from any other tort

defendant in any other kind of case in that the jury does not actually write down fault for the defendant or the plaintiff.

No Appellate Court or Trial Court ever knows what the jury's decision is on comparative fault or doesn't really know what their decision is on damages, because the jury does not reach a gross damage decision and does not write down any comparative fault.

For all those reasons stated, Judge, we believe that the system is unconstitutional.

THE COURT: That objection is filed and noted on the record. And you have some substitute instructions on those issues?

MR. DICK: Yes.

THE COURT: The objection is overruled.

MR. DICK: Judge, the way in which we would [578] propose that the instructions be tendered is a modified M.A.I.

Judge, Instruction B is a modified M.A.I. 8.02 damage instruction modified simply to delete the last sentence, that last sentence instructing the jury to make a comparative fault reduction in their heads.

Then, Judge, we tendered defendant's Instruction C, which is a verdict form patterned after M.A.I. 36.07, which is the verdict form used for any other comparative fault negligence case in Missouri.

And what this verdict form does, it would have the jury determine the fault of Mr. Sorrell and determine the fault of Norfolk Southern and assess the total damages.

THE COURT: So that objection is overruled. Instruction B and verdict form C are refused. Off the record.

* * * *

APPENDIX E

IN THE SUPREME COURT OF MISSOURI

SC87089
ED84268

September Session, 2005

TIMOTHY SORRELL,
Respondent,

vs. (TRANSFER)

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant.

Now at this day, on consideration of the Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2005, and on the 20th day of September, 2005, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 20th day of September, 2005.

/s/ Thomas F. Simon Clerk

_____ D.C.

APPENDIX F

[Logo]

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: August 22, 2005

RE: Motions For Rehearing And/Or Transfer To Supreme Court Denied

1. ED84268 TIMOTHY SORRELL, RES V NORFOLK SOUTHERN, APP

2. ED85136 STEVEN SPIER, APPELLANT V STATE OF MISSOURI, RES

APPENDIX G

FEDERAL EMPLOYERS' LIABILITY ACT (excerpts)

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.)

APPENDIX H

MISSOURI APPROVED JURY INSTRUCTIONS*

8.02 [1996 Revision] Damages—F.E.L.A.—Injury to Employee

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future] as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. [Any award you make is not subject to income tax.] [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number _____, in determining plaintiff's total damages you must not include those damages which would not have occurred without such failure.] [If you find plaintiff contributorily negligent as submitted in Instruction Number _____, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.]

24.01 [1992 Revision] Verdict Directing—F.E.L.A.—Failure to Provide Safe Place to Work

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and

Second, [with respect to such conditions for work,] defendant either failed to provide:

---

* Footnotes and accompanying "Notes on Use" have been omitted.

reasonably safe conditions for work, or reasonably safe appliances, or reasonably safe methods of work, or reasonably adequate help, and

Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent, and

Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____ (*here insert number of affirmative defense instruction*)].

32.07(B) [1996 Revision]—Affirmative Defenses—Contributory Negligence—F.E.L.A.

You must find plaintiff contributorily negligent if you believe:

First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

36.01 [1980 Revision] Form of Verdict—Plaintiff vs. Defendant—Personal Injuries Only

VERDICT _____

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff (*state the name*) for personal injuries against defendant (*state the name*), we, the undersigned jurors, find in favor of:

_____

(Plaintiff (state the name)) or (Defendant (state the name))

Note: Complete the following paragraph only if the above finding is in favor of plaintiff (*state the name*).

We, the undersigned jurors, assess the damages of plaintiff (*state the name*) at $_____ (*stating the amount*).

Note: All jurors who agree to the above findings must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

37.07 [1986 New] Comparative Fault—Form of Verdict—Plaintiff vs. Defendant

VERDICT _____

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff (*state the name*) for personal injury, we, the undersigned jurors, assess percentages of fault as follows:

Defendant	(state the name)	_____%	(zero to 100%)
Plaintiff	(state the name)	_____%	(zero to 100%)
	TOTAL	_____%	(zero *OR* 100%)

Note: Complete the following paragraph if you assessed a percentage of fault to defendant:

We, the undersigned jurors, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be $_____ (stating the amount).

Note: The judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Note: All jurors who agree to the above must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

(4)

Supreme Court, U.S.
FILED
APR 7 - 2006
OFFICE OF THE CLERK

No. 05-746

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Petition for Writ of Certiorari to the
Missouri Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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APRIL 2006

QUESTIONS PRESENTED

1. Whether the court below erred in sustaining the use of a jury instruction that retained, under the Federal Employers' Liability Act ("FELA"), the traditional common-law causation standard for an employee's contributory negligence.

2. Whether this Court should grant review of a question not presented to the court of last resort below and compel FELA trial courts to use special verdict forms, despite the lack of authority—from this Court, lower courts, FELA's text, or the Constitution—requiring special verdicts.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

RESPONDENT'S BRIEF IN OPPOSITION 1

REASONS FOR DENYING THE WRIT 3

I. The First Question Presented Is Unimportant, Identifies No Violation of Federal Law, and Will Not Affect the Outcome of This Case 3

A. The Question Presented Is Insignificant. 3

B. The Missouri Court of Appeals' Approval of Jury Instructions Applying Different Causation Standards to Primary and Contributory Negligence is Consistent with FELA and This Court's Precedents. 4

C. The Missouri Court of Appeals Did Not Use Its Jury Instructions to Defeat Substantive Federal Rights. 8

II. The Second Question Presented Was Not Preserved for Review Nor Does It Otherwise Merit Review. 10

A. Petitioner Did Not Present Its Second Question to the Missouri Supreme Court 10

B. Neither FELA Nor the Constitution Requires Special Verdict Forms 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Page

Adams v. Robertson,
520 U.S. 83 (1997) 10

Bair v. St. Louis-Francisco Railway Co.,
647 S.W.2d 507 (Mo. 1983) 8

Baltimore & O. R. Co. v. Kepner,
314 U.S. 44 (1941) 9

Blue v. Western Railway of Alabama,
469 F.2d 487 (5th Cir. 1972) 11

Boyd v. Grand Trunk Western R. Co,
338 U.S. 263 (1949) 9

Caplinger v. Northern Pacific Terminal,
418 P.2d 34 (Or. 1966) 3

Carter v. Atlanta & St. Andrews Bay Ry. Co.
338 U.S. 430 (1949) 6

Chesapeake & Ohio Railway Co. v. Kelly,
241 U.S. 485 (1916) 8

Consolidated Rail Corp. v. Gottshall,
512 U.S. 532 (1994) 5

Dickerson v. St. Louis Southwestern Railway Co.,
674 S.W.2d 165 (Mo. Ct. App. 1984) 8, 9

Dixon v. Penn Central Co.,
481 F.2d 833 (6th Cir. 1973).....3

Fashauer v. New Jersey Transit Rail Operations, Inc.,
57 F.3d 1269 (3d Cir. 1995).....3

Flener v. Louisville & N.R. Co.,
198 F.2d 77 (7th Cir. 1952).....11

Ganotis v. New York Central Railroad Co.,
342 F.2d 767 (6th Cir. 1965).....3

Giddens v. Kansas City Southern Railway Co.,
29 S.W.3d 813 (Mo. 2000).....12

Grand Trunk Western Railway Co. v. Lindsay,
233 U.S. 42 (1914).....6

Hawkes v. Norfolk & Western Railway Co.,
876 S.W.2d 705 (Mo. Ct. App. 1994).....9

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994).....12

Illinois Central Railroad Co. v. Skaggs,
240 U.S. 66 (1916).....6

Kauzlarich v. Atchison, Topeka & Santa Fe Railway Co.,
910 S.W.2d 254 (Mo. 1995).....9

Koivunen v. States Line,
371 F.2d 781 (9th Cir. 1967).....11

McDowell v. Calderon,
130 F.3d 833 (9th Cir. 1997).....4

Missouri-Kansas-Texas RR. Co. v. Shelton,
383 S.W.2d 842 (Tex. Civ. App. 1964).....6, 7

Norfolk & Western Railway Co. v. Earnest,
229 U.S. 114 (1913) 6

Norfolk & Western Railway Co. v. Ayers,
538 U.S. 135 (2003) 5, 6

Page v. St. Louis Southwestern Railway Co.,
349 F.2d 820 (5th Cir. 1965) 3, 7

Rogers v. Missouri Pacific Railroad Co.,
352 U.S. 500 (1957) 1, 5, 6

Seaboard Air Line Railway v. Tilghman,
237 U.S. 499 (1915) 6

Snyder v. Chicago, Rock Island & Pacific Railroad Co.,
521 S.W.2d 161 (Mo. Ct. App. 1973) 6

St. Louis Southwestern Railway Co. v. Dickerson,
470 U.S. 409 (1985) 8, 9

Street v. New York,
394 U.S. 576 (1969) 10

Tiller v. Atlantic Coast Line R. Co.,
318 U.S. 54 (1943) 1,6

United States v. Norton,
846 F.2d 521 (8th Cir. 1988) 4

Wetherbee v. Elgin, Joliet & Eastern Ry. Co.,
191 F.2d 302 (7th Cir. 1951) 11

Yee v. City of Escondido,
503 U.S. 519 (1992) 11

STATUTES AND RULES

45 U.S.C. § 51 ..... 1, 2, 5

45 U.S.C. § 53 ..... 1, 5

45 U.S.C. § 56 9

Federal Rule of Civil Procedure 49 11

MISCELLANEOUS

Missouri Approved Instruction 8.02 8

Missouri Approved Instruction 11.07 8

Missouri Approved Instruction 24.01 8

Missouri Approved Instruction 37.07(B) 8

Ninth Circuit Manual of Model Civil Jury Instructions 4

Charles H. Traeger, III, *Legal Cause, Proximate Cause, and Comparative Negligence in the FELA*, 18 Stan. L. Rev. 929 (1966) 7

Stern, Gressman, et al., *Supreme Court Practice* (8th ed. 2002) 10

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Norfolk Southern Railway Company asks this Court to review a nonprecedential, unpublished memorandum decision from the Missouri Court of Appeals, which affirmed that the traditional common-law causation standard, embodied in the Missouri Approved Instructions, applies to a plaintiff's contributory negligence under the Federal Employers' Liability Act (FELA), whereas a liberalized causation standard applies to the FELA defendant's primary negligence. Petitioner also asks this Court to demand that FELA juries use special verdict forms rather than general verdict forms.

The first question presented is based on scant and stale case law and addresses an issue that is legally insignificant and will not affect the outcome of this case. The second question presented, which petitioner failed to preserve for review, amounts to an immoderate request that this Court federalize FELA jury verdict forms, for which petitioner offers no statutory or constitutional basis. Neither question merits this Court's attention.

STATEMENT

FELA protects railroad workers by broadening beyond the common law the legal remedies available to redress injuries caused by their employers' negligence. This Court has held that FELA's purpose and plain language expand employers' liability beyond principles of common-law causation to hold railroads or employers liable for injuries caused "in whole or in part" by their negligence. *See Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 507-08 (1957) (interpreting 45 U.S.C. § 51). FELA also includes a comparative negligence provision under which employees' recoveries are reduced rather than completely barred by their own negligence. 45 U.S.C. § 53; *see Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 62-63 (1943). However, section 53's provision on comparative negligence does not specify that the plaintiff's comparative negligence is also judged by

the relaxed "in whole or in part" causation standard applied to the defendant's primary negligence in section 51. Accordingly, different causation standards apply to plaintiff's and defendant's negligence in FELA actions: The defendant is subject to a more relaxed causation standard, but the plaintiff is subject only to the traditional common-law standard.

This case centers on an encounter between two trucks driven by two of petitioner Norfolk Southern's employees. The factual accounts presented at trial are starkly divergent. According to respondent Timothy Sorrell, his truck was forced off the road into a ditch by Norfolk Southern employee Keith Woodin's truck as it passed him from the opposite direction. But according to Woodin, Sorrell carelessly pulled too far over to the side of the road when the trucks were still 400-500 feet apart, causing Sorrel's truck to roll over. As petitioner aptly summarizes: "Simply put, Sorrell claimed that Woodin forced him off the road and Woodin testified that Sorrell drove himself into a ditch." Pet. 4.

Sorrell brought suit under FELA seeking damages for his injuries, and the case was tried to a jury. Norfolk Southern argued that Sorrell had been contributorily negligent and requested that the jury be instructed that the causation standards are identical for both plaintiff's and defendant's negligence. The trial court instructed the jury instead that it must find that the defendant's negligence contributed "in whole or in part" to the plaintiff's injury, as stated in 45 U.S.C. § 51, but that any contributory negligence by the plaintiff "directly contributed" to his injury. Pet. App. 36a.

The railroad also requested a special verdict form specifying whether, and in what proportion, the jury had found Sorrell contributorily negligent. The trial court declined and instead used a general verdict form. Pet. App. 36a-37a. The jury returned a verdict for Sorrell, Pet. App. 26a, and the railroad satisfied the judgment in full.

On appeal, the Missouri Court of Appeals affirmed the judgment, holding that both the jury instruction and use of the general verdict form were lawful. The Missouri Supreme Court denied discretionary review.

REASONS FOR DENYING THE WRIT

I. The First Question Presented Is Unimportant, Identifies No Violation of Federal Law, and Will Not Affect the Outcome of This Case.

A. The Question Presented Is Insignificant.

The supposedly urgent controversy petitioner seeks to bring to this Court's attention is based on a smattering of mostly decades-old opinions in general agreement with each other. *See* Pet. 13-14 (citing *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1281-82 (3d Cir. 1995); *Dixon* v. *Penn Cent. Co.*, 481 F.2d 833, 835 (6th Cir. 1973); *Ganotis* v. *New York Cent. R. Co.*, 342 F.2d 767, 768-69 (6th Cir. 1965); *Page* v. *St. Louis S.W. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965); *Caplinger* v. *N. Pac. Terminal*, 418 P.2d 34, 35-36 (Or. 1966)). Far from evidencing an issue of "imperative" importance, *see* Pet. 15, that this issue surfaces in the case law once every decade or two is more correctly seen as an indication of its inconsequential weight. Further, the standards have thus far had an uneventful twenty-eight-year-long tenure in Missouri. *See* Norfolk Southern Apl. Br. 29 (noting that the standards diverged in 1978). But evidence of the matter's insignificance need not be limited to the timeline: The cases themselves acknowledge that there is little practical import. *See Page*, 349 F.2d at 823 ("At the outset, there is the doubt that such casuistries have any practical significance as the jury, undergoing its once in-a-lifetime exposure to the equivalent of a law school lecture, seeks to translate instruction into definitive answers . . . ."); *Caplinger*, 418 P.2d at 36 ("It is not exactly clear what real

difference the double standard instruction would make in the trial of a Federal Employers' Liability Act case.").[1]

Even if differing causation standards might be significant in some cases, the facts of Sorrell's case render any such difference irrelevant, making this case a poor vehicle for examining the questions presented. As petitioner itself notes, at trial, Sorrell and the railroad gave starkly divergent accounts of the events: Sorrell said that Woodin forced him off the road; Woodin said that Sorrell drove himself into a ditch. *See* Pet. 4. Under *either* measure of causation—contributed "in whole or in part" or "directly contributed"—the jury was forced to side entirely with Sorrell or entirely with Woodin based on the facts before it. There was little room under either side's version of the facts to allow for its own negligence, regardless of the causation standard used.

B. The Missouri Court of Appeals' Approval of Jury Instructions Applying Different Causation Standards to Primary and Contributory Negligence is Consistent with FELA and This Court's Precedents.

The Missouri Court of Appeals' decision is consistent with all decisions of this Court and the plain language of FELA. Although this Court has held that a relaxed causation

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[1] Petitioner also cites pattern jury instructions from several circuits supporting its view of FELA causation. *See* Pet. 14. Pattern jury instructions are not binding precedent and so are not properly considered part of a federal circuit conflict: "[Model] [j]ury instructions [are] not blessed with any special precedential or binding authority." *McDowell v. Calderon*, 130 F.3d 833, 840 (9th Cir. 1997) (en banc). Model jury instructions are "not a substitute for the individual research and drafting that may be required in a particular case." *Ninth Circuit Manual of Model Civil Jury Instructions*, Introduction (citing *McDowell*); *see also United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988) ("The Model Instructions . . . are not binding on the district courts of this circuit, but are merely helpful suggestions to assist the district courts.").

standard, rather than the traditional common-law standard, applies to defendants under 45 U.S.C. § 51, *see Rogers*, 352 U.S. at 507-08, it has never said that the same causation standard applies to FELA plaintiffs' contributory negligence under 45 U.S.C. § 53. Rather, this Court's FELA jurisprudence demonstrates that the plaintiff's contributory negligence causation standard remains that of traditional common law.

As this Court has consistently held, FELA's purpose is to protect railroad employees from the harshness of the traditional common law. See *Rogers*, 352 U.S. at 507 ("[FELA] was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant."); *see also Norfolk & W. Ry. Co.* v. *Ayers*, 538 U.S. 135, 145 (2003) ("Congress designed the FELA to shif[t] part of the human overhead of doing business from employees to their employers.") (internal quotations omitted). All FELA provisions—particularly those that abrogate traditional common-law defenses—are interpreted with this employee-protective purpose in mind, but "[o]nly to the extent of these explicit statutory alterations . . . is [the] FELA an avowed departure from the rules of the common law." *Id.* at 145 (internal quotations omitted); *accord Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994).

Thus, in *Rogers*, the Court held that FELA section 51 explicitly abrogates the employer's traditional common-law causation standard for the employer's primary negligence through its use of the words "in whole or in part," a result consistent with FELA's worker-protective purpose. *See Rogers*, 352 U.S. at 506-10. But neither the purpose nor plain language of FELA section 53 demands the same conclusion for the employee's contributory negligence. On the contrary, that section 53 contains no language about the employee's causation standard compels the conclusion that in the absence of "explicit statutory alterations," the default

common-law standard applies. *See Norfolk*, 538 U.S. at 145.[2]

Petitioners cite several of this Court's pre-*Rogers* cases in an attempt to demonstrate that unequal causation standards are incompatible with FELA. *See* Pet. 9-11 (citing *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949); *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943); *Illinois Cent. R.R.* v. *Skaggs*, 240 U.S. 66 (1916); *Seaboard Air Line Ry.* v. *Tilghman*, 237 U.S. 499 (1915); *Grand Trunk W. Ry.* v. *Lindsay*, 233 U.S. 42 (1914); *Norfolk & W. Ry. Co.* v. *Earnest*, 229 U.S. 114 (1913)). But those early decisions merely restate the general principle that FELA abrogates the contributory negligence bar and substitutes proportional comparative fault for the harsh common-law rule. The cases say nothing about whether the causation standard for plaintiffs is different from the standard for defendants. Indeed, the cases cited by petitioner are necessarily irrelevant to the question presented, because they were all decided before *Rogers* definitively established that the defendant's causation standard was not the traditional common-law measure, but rather the relaxed "in whole or in part" causation standard. Inexplicably, petitioner does not cite, let alone discuss, *Rogers*—an omission that enfeebles its entire discussion of FELA's causation standards.

To be sure, the few lower federal courts and state courts to have considered the issue mostly agree, albeit generally with little analysis, that the employer's and employee's causation standards should be the same. However, despite petitioner's claim to the contrary, *see* Pet. 8, Missouri is not alone in holding that different standards of causation apply to a railroad defendant's primary negligence and a plaintiff

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[2] The Missouri instruction requiring that the plaintiff's negligence "directly contribute" to his injury reflects the common-law proximate cause standard. *See Snyder* v. *Chicago Rock Island & Pac. R.R. Co.*, 521 S.W.2d 161, 165 (Mo. Ct. App. 1973).

employee's contributory negligence. *See Missouri-Kansas-Texas R.R. Co.* v. *Shelton*, 383 S.W.2d 842, 846 (Tex. Civ. App. 1964). The courts that support petitioner's position have done so through a flawed interpretation of FELA's purposes, a failure to properly consider the statutory text, and the mistaken belief that different causation standards would make the jury's job in weighing comparative fault difficult. *See, e.g., Page*, 349 F.2d at 824.

Petitioner asserts that calculating proportional fault using unequal causation standards is illogical. *See* Pet. 10-12. But petitioner is fundamentally mistaken about the role of causation in a system of comparative fault. As one commentator observed, "the sole function of a legal cause standard in this comparative negligence system is to signify when a comparison is to be made . . . . Once the legal cause test indicates that a comparison is to be made, its function in the comparative negligence system is over." Charles H. Traeger, III, *Legal Cause, Proximate Cause, and Comparative Negligence in the FELA*, 18 Stan. L. Rev. 929, 935 (1966).

Rather than creating two incommensurate scales that make the comparison of fault impossible, the different causation standards simply act as gatekeepers, or thresholds, that determine which acts or omissions can be included in the computation of fault. Having two gatekeepers presents no insurmountable problems of workability or logic: Although the universe of acts or omissions is larger for the defendant than for the plaintiff, once the boundaries are drawn, the plaintiff's and defendant's acts or omissions that have now been made part of the equation are weighed just as they would be in any other analysis of comparative fault. As petitioner itself puts it: "[F]ault, not causation, is the relevant metric for apportioning financial responsibility." Pet. 11. Indeed, causation drops out of the equation once its gatekeeping function has been served: The jury then compares the defendant's negligence to the plaintiff's negligence, which are judged by the same standards, and

reduces the plaintiff's award by "diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff." Pet. App. 35a (MAI 8.02); Legal File 26.[3]

C. The Missouri Court of Appeals Did Not Use Its Jury Instructions to Defeat Substantive Federal Rights.

Petitioner argues that the Missouri Court of Appeals' reliance on its model jury instructions, the Missouri Approved Instructions, defeats federal rights and conflicts with *St. Louis S.W. Ry. Co.* v. *Dickerson*, 470 U.S. 409 (1985). *See* Pet. 15. However, unlike in *Dickerson*, the causation MAIs reflect Missouri's interpretation of federal, not state, law. In *Dickerson*, the Missouri Court of Appeals refused to stray from an MAI that did not provide for a jury instruction on the present value of future damages, noting that

> [t]he Missouri Supreme Court has held that ". . . a present value instruction was not appropriate under MAI." *Bair v. St. Louis-Francisco Ry. Co.*, 647 S.W.2d 507, 510 (Mo. banc 1983); but cf. *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485 . . . (1916) (on writ of error to the Court of Appeals of Kentucky, the U.S. Supreme Court reversed and remanded the case because of the trial court's refusal to give a requested present value instruction). The point is denied.

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[3] The definitions of plaintiff's and defendant's negligence are identical in the MAIs used at trial. *See* MAI 37.07(B) n.1 (West 2002); MAI 24.01 n.4 (West 2002); MAI 11.07 ("The term 'negligent' or 'negligence' as used in this [these] instruction[s] means the failure to use ordinary care."); *see* Trial Tr. 572 (reflecting the trial court's approval of a negligence instruction based on MAI 11.07).

Dickerson v. *St. Louis S.W. Ry. Co.*, 674 S.W.2d 165, 169-70 (Mo. Ct. App. 1984) (emphasis added). Because the Missouri court refused to follow *Kelly*, this Court held that the decision constituted denial of a federal right under FELA. *Dickerson*, 470 U.S. at 411-12.

Here, unlike in *Dickerson*, the Missouri court did not apply its MAI in conscious disregard of a federal right. Instead, it applied jury instructions embodying its views (and those of the Missouri Supreme Court) on the correct interpretation of FELA. There was no need to "look beyond the face" of the MAI, *see* Pet. 15, because the MAI was a facially correct interpretation of federal law. As the Missouri courts have often recognized, the propriety of various jury instructions in FELA cases presents an issue of substantive *federal* law. *See, e.g., Kauzlarich* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 910 S.W.2d 254, 258 (Mo. 1995); *Hawkes* v. *Norfolk & W. Ry.*, 876 S.W.2d 705, 706 (Mo. Ct. App. 1994).[4]

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[4] In an attempt to make its first question presented seem more significant, petitioner tars St. Louis, Missouri as "pro-plaintiff," Pet. 16, and claims that "[t]his case illustrates forum shopping at its worst." Pet. 17. But petitioner's misplaced invective cannot undermine the plain language of FELA, which provides a liberal venue provision. *See* 45 U.S.C. § 56; *see also Baltimore & O. R. Co. v. Kepner*, 314 U.S. 44, 53-54 (1941) ("The privilege was granted because the general venue provisions worked injustices to employees."); *Boyd v. Grand Trunk Western R. Co*, 338 U.S. 263, 266 (1949). Sorrell's choice of venue was particularly understandable given that his principal witnesses and Norfolk Southern headquarters for the division to which he was assigned were all located in St. Louis, and the railroad's key witness, Keith Woodin, resided in the state of Missouri.

II. The Second Question Presented Was Not Preserved for Review Nor Does It Otherwise Merit Review.

A. Petitioner Did Not Present Its Second Question to the Missouri Supreme Court.

The railroad argues that the Missouri Court of Appeals' refusal to require the trial court to use a special verdict form violates FELA and discriminates against federal rights. Pet. 17-22. In its opening brief to that court, the railroad argued that a special verdict form was required by FELA and the Constitution, *see* Norfolk Southern Appellant Br. 64-75, and the court rejected the argument. Pet. 17a-18a. The railroad, however, omitted this issue from its Application for Transfer to the Missouri Supreme Court, filed in the Missouri Supreme Court. Because of this omission, the Court should deny review of the second question presented.

"[W]hen the highest state court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." Stern, Gressman, et al., *Supreme Court Practice* 175 (8th ed. 2002); *see Street* v. *New York*, 394 U.S. 576, 582 (1969). Because "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider," this "rule affords state courts an opportunity to consider" the questions presented in the first instance. *Adams* v. *Robertson*, 520 U.S. 83, 90 (1997) (internal citation omitted); *see also id.* (state's highest court "has an undeniable interest in having the opportunity in this case to determine in the first instance whether its existing rules governing class-action[s] satisfy the requirements of due process"). The Missouri Supreme Court did not have that opportunity and, accordingly, this Court should deny review. That conclusion follows regardless of whether the Court treats the requirement as prudential or jurisdictional.

Id.; *see also Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

B. Neither FELA Nor the Constitution Requires Special Verdict Forms.

Even if petitioner's challenge to Missouri's general verdict form in FELA cases were preserved, it does not deserve further review. Petitioner asserts that the general verdict form used in Missouri FELA trials renders post-trial review of the verdicts "impossible," violating the railroad's right to a "proper allocation of damages" under FELA. Pet. 19. Petitioner argues that FELA trial courts must "superintend the jury's decisionmaking," *id.*, and that Missouri's use of general jury verdict forms for FELA cases—but not for state-law tort cases—constitutes discrimination against a federal right. Pet. 19, 21-22. In light of petitioner's failure to identify any cases from this Court, lower federal courts, or state courts supporting its contention that FELA requires special jury verdicts, this Court should deny review of this question.

Petitioner cites several lower federal court decisions to illustrate a purported majority rule requiring special verdicts. *See* Pet. 20 (citing *Blue* v. *W. Ry. of Ala.*, 469 F.2d 487 (5th Cir. 1972); *Koivunen* v. *States Line*, 371 F.2d 781 (9th Cir. 1967); *Flener* v. *Louisville & Nashville Ry.*, 198 F.2d 77 (7th Cir. 1952); *Wetherbee* v. *Elgin, Joliet & E. R. Co.*, 191 F.2d 302 (7th Cir. 1951)). These decisions are inapposite. Rather than finding a statutory or constitutional right to a special verdict form, they merely comment that a special verdict issued under Federal Rule of Civil Procedure 49 would have avoided the need for reversal and remand in some of the cases or potentially unnecessary appeals in others. For example, when an appeals court determined that there was insufficient evidence for a contributory negligence jury instruction, the general verdict did not allow it to determine how much the jury might have reduced the award in error. *See Koivunen*, 371 F.2d at 783. None of the cases embraces

the broad view petitioners advance—that trial courts are required "to superintend" FELA jury deliberations through special verdicts. *See* Pet. 19.

Nor does the Constitution require the use of special jury verdicts. Petitioner's underlying theory is that FELA defendants have a right to intrude into jury deliberations to ensure that the jury is properly applying the law. However, there is no such right to monitor a jury's deliberations, and petitioner offers no basis for concluding that FELA cases necessitate greater monitoring of jury deliberations than any other kind of case. To the contrary, jurors in all cases are presumed to follow their instructions. *See Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 443 (1994).

Petitioner again argues that the Missouri Court of Appeals frustrated federal rights under FELA in refusing to require a special verdict form. Pet. 20. But the Court of Appeals simply reasoned that the railroad had not presented persuasive statutory or constitutional argument to support its views. *See* Pet. Ap. 17a-18a. The appeals court also cited *Giddens* v. *Kansas City S. Ry. Co.*, 29 S.W.3d 813, 824 (Mo. 2000), in which the Missouri Supreme Court specifically rejected a railroad's argument that Missouri was discriminating against negligence actions under FELA when the railroad was "simply objecting to how Missouri allows the jury to record its damage verdict in such cases, not to law governing the standards under which such damages may be awarded." *Id.* Rather than spurn federal rights, the Missouri Court of Appeals decided that the MAIs were in harmony with them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-746

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

REPLY BRIEF

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RULE 29.6 STATEMENT

Norfolk Southern Railway Company has a parent company, the Norfolk Southern Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

REPLY BRIEF 1

CONCLUSION 10

TABLE OF AUTHORITIES

CASES Page

Adams v. *Robertson*, 520 U.S. 83 (1997) 9
Brady v. *Southern Ry.*, 320 U.S. 476 (1943) 5
Brady v. *Terminal R.R. Ass'n*, 303 U.S. 10 (1938) 5
Brown v. *Western Ry. of Ala.*, 338 U.S. 294 (1949) 5
Caplinger v. *Northern Pac. Terminal*, 418 P.2d 34 (Or. 1966) 1
Campbell v. *Louisiana*, 523 U.S. 392 (1998) 9
Carter v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949) 5
Chapman v. *Union Pac. R.R.*, 467 N.W.2d 388 (Neb. 1991) 7
Coray v. *Southern Pac. Co.*, 335 U.S. 520 (1949) 5, 6
Cornet & Zeibig, Inc. v. *430 Withers Realty Co.*, 415 S.W.2d 751 (Mo. 1967) 9
Cuyler v. *Sullivan*, 446 U.S. 335 (1980) 8
Davis v. *Kennedy*, 266 U.S. 147 (1924) 5
Davis v. *Wolfe*, 263 U.S. 239 (1923) 5
Director, OWCP v. *Newport News Shipbuilding*, 514 U.S. 122 (1995) 3
Dixon v. *Penn Cent. Co.*, 481 F.2d 833 (6th Cir. 1973) 1
Fashauer v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269 (3d Cir. 1995) 1, 2, 5
Fletcher v. *Union Pac. R.R.*, 621 F.2d 902 (8th Cir. 1980) 7
Ganotis v. *New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965) 1
Gardner v. *CSX Transp., Inc.*, 498 S.E.2d 473 (W. Va. 1997) 7
Hines v. *Sweeney*, 201 P. 165 (Wyo. 1921) 6
Holbrook v. *Norfolk S. Ry.*, 414 F.3d 739 (7th Cir. 2005) 7

TABLE OF AUTHORITIES—continued

Page

Johnson v. *Offshore Express, Inc.*, 845 F.2d 1347 (5th Cir. 1988) 7, 9
Lang v. *New York Cent. R.R.*, 255 U.S. 455 (1921) 5
Lyles v. *Alabama State Docks Terminal Ry.*, 730 So. 2d 123 (Ala. 1998) 7
Marazzato v. *Burlington N. R.R.*, 817 P.2d 672 (Mont. 1991) 7
McCalley v. *Seaboard Coast Line R.R.*, 265 So. 2d 11 (Fla. 1972) 7
McKnett v. *St. Louis & S.F. Railway*, 292 U.S. 230 (1934) 10
Minneapolis, St. Paul & Sault Ste. Marie Ry. v. *Goneau*, 269 U.S. 406 (1926) 5
New York Cent. R.R. v. *Ambrose*, 280 U.S. 486 (1930) 5
New York Cent. R.R. v. *Winfield*, 244 U.S. 147 (1917) 1
New York, Chi. & St. Louis R.R. v. *Niebel*, 214 F. 952 (6th Cir. 1914) 6
Nicholson v. *Erie R.R.*, 253 F.2d 939 (2d Cir. 1958) 7
Norfolk & W. Ry. v. *Ayers*, 538 U.S. 135 (2003) 4
Norfolk & W. Ry. v. *Earnest*, 229 U.S. 114 (1913) 10
Northwestern Pac. R.R. v. *Bobo*, 290 U.S. 499 (1934) 5
O'Donnell v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384 (1949) 5
Oglesby v. *Southern Pac. Transp. Co.*, 6 F.3d 603 (9th Cir. 1993) 7
Orchelle v. *CSX Transp., Inc.*, 574 So. 2d 749 (Ala. 1990) 7
Page v. *St. Louis S.W. Ry.*, 312 F.2d 84 (5th Cir. 1963) 7

TABLE OF AUTHORITIES—continued

Page

Page v. *St. Louis S.W. Ry.*, 349 F.2d 820 (5th Cir. 1965) 1, 2, 4
Reed v. *Pennsylvania R.R.*, 171 N.E.2d 718 (Ohio 1961) 7
Reed v. *Philadelphia, Bethlehem & New England R.R.*, 939 F.2d 128 (3d Cir. 1991) 7
Rodriguez de Quijas v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) 6
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) 5, 6
Snipes v. *Chicago, Cent. & Pac. R.R.*, 484 N.W.2d 162 (Iowa 1992) 7
St. Louis, Iron Mountain & S. Ry. v. *McWhirter*, 229 U.S. 265 (1913) 5
St. Louis-S.F. Ry. v. *Mills*, 271 U.S. 344 (1926) 5
St. Louis S.W. Ry. v. *Dickerson*, 470 U.S. 409 (1985) 1, 2, 3, 10
Street v. *New York*, 394 U.S. 576 (1969) 9
Strobel v. *Chicago, Rock Island & Pac. R.R.*, 96 N.W.2d 195 (Minn. 1959) 7
Summers v. *Missouri Pac. R.R. Sys.*, 132 F.3d 599 (10th Cir. 1997) 7
Swinson v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529 (1935) 5
Tennant v. *Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944) 5, 6
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) 5
Ulfik v. *Metropolitan-N. Commuter R.R.*, 77 F.3d 54 (2d Cir. 1996) 7
Urie v. *Thompson*, 337 U.S. 163 (1949) 3, 5

TABLE OF AUTHORITIES—continued

Page

STATUTES AND CONSTITUTION

45 U.S.C. § 51 4
45 U.S.C. § 53 4
Mo. Const. art. V, § 10 9

RULE

Mo. Sup. Ct. R. 83.09 9

SCHOLARLY AUTHORITY

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 9

REPLY BRIEF

In its Petition, Norfolk Southern Railway Company (NS) demonstrated that the ruling below, which enforced mandatory state jury instructions approved by the Missouri Supreme Court (MAI), stands squarely in conflict with the decisions of four courts of appeals and one state supreme court. Pet. 12-15. Sorrell concedes the split, Opp. 3, and helpfully notes that the split is actually deeper, *id.* at 6-7. Moreover, the decision below is separately in plain conflict with *St. Louis S.W. Ry.* v. *Dickerson*, 470 U.S. 409 (1985) (per curiam). Contrary to Sorrell's claims, *Dickerson* forbade state courts to rely upon Missouri jury instructions in disregard of federal law, not solely federal law established by prior decisions of this Court. This Court should grant review to resolve the conflicts on important issues of federal law where uniformity is paramount to protect the balance of interests between railroads and their employees.

1. The rule below, based on a mandatory jury instruction issued by the Missouri Supreme Court, requires defendant employers under FELA to meet a higher threshold in proving an employee's *comparative negligence* than the employee must meet in the first instance in demonstrating the employer's *negligence*. MAI 24.01, 32.07(B) (Pet. App. 35a-36a). That rule conflicts squarely with decisions of the Third, Fifth, and Sixth Circuits and the Oregon Supreme Court. *Fashauer* v. *N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1282 (3d Cir. 1995); *Dixon* v. *Penn Cent. Co.*, 481 F.2d 833, 835 (6th Cir. 1973); *Page* v. *St. Louis S.W. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965); *Ganotis* v. *N.Y. Cent. R.R.*, 342 F.2d 767, 768-69 (6th Cir. 1965); *Caplinger* v. *N. Pac. Terminal*, 418 P.2d 34, 35-36 (Or. 1966). Sorrell candidly concedes the existence of the conflict, Opp. 3, 6, finding no support for Missouri's extreme minority rule except in a single decision of the Texas Court of Civil Appeals and a law review note, *id.* at 6-7. This concession alone justifies this Court's review. FELA is a federal statute that demands a uniform rule. *New*

York Cent. R.R. v. *Winfield*, 244 U.S. 147, 150 (1917).

Laboring mightily to turn his sow's ear into something better, Sorrell argues that the issue does not merit review because it arises infrequently in published decisions. This is simply because the wayward Missouri rule has no support in law or logic to commend it. See *infra* point 3. The issue does not arise anywhere else because the rule of law is so well established. The conflict is square, and permitting a pro-plaintiff rule in Missouri state court is unfair to railroads and promotes forum-shopping under the liberal venue rules of FELA.[1] Moreover, Sorrell is simply incorrect to assert that the authorities contrary to his position employ "little analysis." Opp. 6. The leading decisions amply treat the issue. *E.g.*, *Fashauer*, 57 F.3d at 1282-83; *Page*, 349 F.2d at 825-27. In any event, it is the conflict in the authorities, not the scope of the opinions, that justifies review.

2. The decision below is also flatly in conflict with this Court's decision in *Dickerson*. There, this Court unanimously held that the Missouri Court of Appeals erred when it rejected a FELA defendant's federal-law argument solely because it was foreclosed by Missouri's binding jury instructions. 470 U.S. at 411. Contrary to Sorrell's argument, Opp. 8-9, *Dickerson* in no way turned on whether the Missouri Court of Appeals had affirmatively rejected this Court's precedents.

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[1] Even were it true that this precise issue is litigated infrequently, that is no reason to deny certiorari. The issues of comparative negligence between a railroad and employee, and the proper instructions on causation, are common in FELA cases. Moreover, this is an extraordinarily important issue in St. Louis, where FELA cases are brought with disproportionate frequency. Pet. 16-17 & n.11. To observe this fact is neither "invective" nor "misplaced," Opp. 9 n.4—it is a simple empirical observation that aggressive forum-shopping brings many FELA suits to St. Louis to take advantage of favorable juries and judges, as the sources cited in the Petition indicate. Sorrell lived and worked in northeast Indiana, more than 300 miles from St. Louis, and that is where the accident occurred. His suggestion that he brought this case in St. Louis for the convenience of NS's witnesses, *id.*, is at best disingenuous.

Rather, this Court simply held that "the substantive law governing [FELA cases] is federal" and so must be followed by state courts, no matter what state jury instructions might otherwise require. 470 U.S. at 411. Indeed, in resolving FELA claims, courts apply common law "'as established and applied in the federal courts.'" *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). This Court is the final expositor of federal common law but federal common law still exists even if this Court has not settled the specific common law rule, and the Missouri Court of Appeals was obliged to apply, based on an analysis of federal common law, the proper causation standards.

In this case, just as in *Dickerson*, the Missouri Court of Appeals relied wholly and exclusively on the existence of an MAI, in utter disregard of federal law. Pet. App. 7a. Contrary to Sorrell's claim, Opp. 9, nothing in the opinion below suggests that the court of appeals relied upon the MAI because it was a correct statement of federal law, see Pet. App. 7a. Rather, the court simply followed the MAI as binding, and in so doing, abrogated NS's federal statutory right to a proper apportionment of damages under the correct causation standards. The Missouri Court of Appeals' exclusive reliance on an MAI that conflicts with FELA warrants summary reversal under *Dickerson*. The fact that the ruling is unpublished from an intermediate court does not insulate it from this Court's review. The rule of law in Missouri is settled by the Missouri Supreme Court's instruction. If the Court denies decision for this reason, it never will have a suitable vehicle for deciding the question presented arising out of Missouri.

3. Sorrell attempts to invent a federal-law rationale for the rule below when the state court stated none, but his arguments fail. He "retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Director, OWCP* v. *Newport News Shipbldg*, 514 U.S. 122, 135 (1995). But the policy and purposes of the Act are not systematically to favor plaintiffs over defendants, as Sorrell presumes, Opp. 5, but to provide a

federal remedy for injured employees according to the rules of the evolving common law, except where there is an "'explicit statutory alteration[].'" *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003).

As the Petition demonstrates, the current and longstanding common-law rule is that the same causation standard applies to claims of a defendant's negligence and a plaintiff's contributory negligence. Pet. 9-12 & nn.7-8 (citing, *inter alia*, the Second and Third Restatements of Torts). Nothing in FELA alters this traditional rule. FELA creates liability for the "negligence" attributable to a railroad employer, see 45 U.S.C. § 51, and it diminishes that liability to the extent of the employee's "contributory negligence," *id.* § 53. There is no indication whatsoever that Congress used the term "negligence" to mean different things, or to deviate from common-law principles of causation, in these two closely related and interdependent sections of the same statute.

There is certainly nothing in the statute to indicate that Congress intended to create an unprecedented scheme by which a plaintiff's and a defendant's negligence are to be compared using different metrics. *Page*, 349 F.2d at 824 ("it is obvious that for a system of comparative fault to work, the basis of comparison has to be the same"). Notably, although Sorrell asserts that such a regime theoretically could exist, Opp. 7-8, he cannot identify a single instance in which any jurisdiction has implemented this asymmetrical approach. This is with good reason. Such a system would be difficult to administer, Pet. 12, and it would lead to bizarre and unjust results. For instance, a plaintiff whose conduct was a *more substantial* causal factor in his own injury than the defendant's conduct, and who was *more* at fault, would nonetheless recover full damages. This was not the vision of comparative fault that Congress had in mind; it wanted differences in fault alone, not causation, to govern the apportionment of damages. "[T]o adopt [Sorrell's] argument would be to abandon the clear dictate of the statute in favor of a policy decision to fa-

vor employees over employers." *Fashauer*, 57 F.3d at 1283.

Sorrell claims that divergent causation standards are justified because in his view FELA explicitly authorizes a departure from the federal common-law rule of proximate cause for railroads (without expressly addressing the causation rule for employee contributory negligence), and he faults NS for not addressing the case that he claims establishes that principle (*Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957)). Opp. 5-6. NS agrees that a determination of the causation standard for railroad negligence is necessary to resolve the question presented, but Sorrell's analysis is off the mark. As the Petition expressly points out, "[t]he predicate rule in Missouri that FELA eliminates the proximate cause requirement for railroad negligence is contrary to federal law," Pet. 14-15 (citing *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)).

Sorrell's claim that FELA expressly abrogates the rule of proximate cause for railroads, and that *Rogers* recognized that abrogation, is wrong. The statutory requirement that a railroad may be liable for injury "resulting in whole or in part from" the railroad's negligence, Pet. App. 33a, is fully consistent with the proximate-cause standard. As this Court has repeatedly held, proximate cause is the standard under FELA,[2]

[2] *Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943); *Davis*, 263 U.S. at 243; *see, e.g.*, *N.W. Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926) (same); *Lang* v. *N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *see also, e.g.*, *Brown* v. *W. Ry. of Ala.*, 338 U.S. 294, 297-98 (1949); *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435 (1949); *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Urie*, 337 U.S. at 195; *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949); *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *Swinson* v. *Chi., St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 409-10 (1926); *Davis* v. *Kennedy*, 266 U.S. 147, 148 (1924); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913).

and the statute simply requires that a plaintiff prove that "negligence was the proximate cause in whole or in part" of the injury, *Tennant*, 321 U.S. at 32; *Coray v. Southern Pac. Co.*, 335 U.S. 520, 523 (1949) (the railroad's conduct must be either "the sole or a contributory proximate cause").

Rogers did not overrule, implicitly or explicitly, the many precedents of this Court establishing the federal rule of proximate cause under FELA; indeed, it relied upon them. 352 U.S. at 506 n.11, 507 n.13. *Rogers* simply rejected a particular state common-law conception of "proximate cause" that limited railroad liability to circumstances where its negligence was the "sole, efficient, producing cause of injury." *Id.* at 506. That conception was contrary to the plain language of FELA and this Court's prior precedents. *Rogers* made clear that where the jury could find either the employee's or the railroad's negligence to be a proximate cause of injury, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* If that test is met, "a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Id.* at 507. *Rogers* thus applied the longstanding rule that, when the evidence would support a jury finding of other proximate causes, "the railroad company is liable, if its negligence contributes proximately to the injury, no matter how slightly, and no matter how great may be the negligence of the employee." *Hines* v. *Sweeney*, 201 P. 165, 170 (Wyo. 1921); *N.Y., Chi. & St. Louis R.R.* v. *Niebel*, 214 F. 952, 955 (6th Cir. 1914) (a railroad "is liable, if through other employés it is guilty of any causative negligence no matter how slight in comparison to that of plaintiff"). *Rogers* did not *sub silentio* overrule the long line of this Court's FELA cases, as Sorrell contends, Opp. 6, and only this Court has the prerogative to decide whether a later decision abrogated prior precedent. *Rodriguez de Quijas* v. *Shearson/Am. Expr., Inc.*, 490 U.S. 477, 484 (1989).

Conflicts concerning the proper interpretation of *Rogers* and FELA's causation standard constitute more reason, not less, to grant the Petition. Despite this Court's repeated statements that proximate cause is the standard under FELA, see *supra* n.2, there is widespread confusion in the lower courts about this issue. At least eight federal courts of appeals and state supreme courts properly recognize that proximate causation is the rule.[3] In direct conflict, at least seven federal courts of appeals and state supreme courts hold that *Rogers* replaced the rule of proximate cause, and that FELA liability now can arise on a showing of "'featherweight'" causation.[4] A third category of cases holds that *Rogers* did not even speak to the standard of causation under FELA, but dealt instead with multiple causation and the test of a jury case. *Marazzato*, 817 P.2d at 674; *Strobel* v. *Chi., Rock Island & Pac. R.R.*, 96 N.W.2d 195, 199-200 (Minn. 1959). The issue of what standard applies to plaintiff and defendant negligence under FELA is "'predicate to intelligent resolution'" of whether the standards for plaintiff and defendant negligence are the same, *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 n.6 (1980); Opp. 5-6, and so the pervasive confusion on this issue is further reason to grant review.

[3] *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991); *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 674-75 (Mont. 1991); *Reed* v. *Pa. R.R.*, 171 N.E.2d 718, 721-22 & n.3 (Ohio 1961); *see also Reed* v. *Philadelphia, Bethlehem & N. Eng. R.R.*, 939 F.2d 128, 130 (3d Cir. 1991); *Lyles* v. *Ala. State Docks Terminal Ry.*, 730 So. 2d 123, 125 (Ala. 1998); *Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997); *Snipes* v. *Chi., Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992); *Orchelle* v. *CSX Transp., Inc.*, 574 So. 2d 749, 752 (Ala. 1990).

[4] *Johnson* v. *Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988); *see also Holbrook* v. *Norfolk S. Ry Co.*, 414 F.3d 739, 741-42 (7th Cir. 2005); *Summers* v. *Mo. Pac. R R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997); *Ulfik* v. *Metro-N. Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996); *Oglesby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993); *Fletcher* v. *Union Pac. R.R.*, 621 F.2d 902, 909 (8th Cir. 1980); *Page* v. *St. Louis S.W. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963); *Nicholson* v. *Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So. 2d 11, 15 (Fla. 1972).

Finally, even if *arguendo Rogers* did lower the threshold for employer negligence under FELA, there is no reason to believe that the threshold for proving a plaintiff's comparative negligence was not likewise lowered. The conflict on that point is squarely presented, and must be resolved even if this Court were to adopt Respondent's reading of the statute.

4. Sorrell further argues that the Court should not take this case because "the facts of [this] case render any [error] irrelevant." Opp. 4. This is no place to argue the facts of the case, but suffice it to say that Sorrell's assertion is pure speculation, and the effect of the erroneous instruction on the jury is wholly unknowable. It assuredly is *not* the case that the jury had to "side entirely with Sorrell or entirely with Woodin," *id.* If this were true, then the trial court could not have given a contributory negligence instruction (to which Sorrell never objected); the only issue would have been railroad negligence. Moreover, there were any number of issues as to which the jury could have believed Sorrell or Woodin in part, and it therefore could have ascribed partial liability to Sorrell under a properly announced contributory-negligence standard. NS presented evidence based on the physical dimensions of the trucks and the roadways that the truck would not have tipped over if Sorrell's testimony were true. The jury could have determined, for instance, that Woodin drove negligently, but that Sorrell negligently pulled over too far to the side of the road, or did not slow down enough, Tr. 458, or swerved too hard and therefore contributed to the accident. It could have credited the accident report that Sorrell filled out on the day of the accident, in which he stated (contrary to his trial testimony), that both drivers got off the road, *id.* at 464. It could have credited Woodin's account, but concluded that his approaching Sorrell caused Sorrell's truck to fall into the ditch, and so both bore some fault. These issues are for a properly instructed jury to determine in the first instance. And, they demonstrate why Sorrell is mistaken to argue that the causation standard is insignificant. The "'featherweight'"

causation standard employed by the court below, *Johnson*, 845 F.2d at 1352, means that very thin evidence can lead to major verdicts (as occurred in this case), and so alterations in the causation standard substantially affect the size of the awards.

5. Whether the issuance of improper jury instructions affected the verdict in this case would not be such guesswork if the court had appropriately instructed the jury to specify its apportionment of fault on the verdict form. Pet. 17-22.[5] The Petition demonstrates—and Sorrell does not contest—that in the absence of a special verdict, it is impossible to determine whether a jury correctly applied FELA's rules concerning contributory negligence. Pet. 18. Sorrell's sole response is to mischaracterize the issue as whether "FELA defendants have a right to intrude into jury deliberations." Opp. 12. Determining whether a jury has faithfully applied its instructions does not "intrude" into the deliberations any more than instructing the jury in the first place. The cases set forth in the

[5] This second issue is not waived. *Cf.* Opp. 10-11. It was raised to, briefed before, and passed upon by, the Missouri Court of Appeals. An issue "must be pursued [in state appellate courts] in the manner and with the degree of specificity required by the state rules of practice," Robert L. Stern et al., *Supreme Court Practice* 179 (8th ed. 2002), and it is black-letter law that on a motion for transfer, the Missouri Supreme Court takes an entire case, not only the issues specially highlighted in the transfer petition. Mo. Const. art. V, § 10; Mo. Sup. Ct. R. 83.09; *Cornet & Zeibig, Inc.* v. *430 Withers Realty Co.*, 415 S.W.2d 751, 753 (Mo. 1967). NS did everything that was required to present this issue to the Missouri Supreme Court, and so "the claim was raised '"at the time and in the manner required by the state law."'" *Adams* v. *Robertson*, 520 U.S. 83, 87 (1997) (per curiam). Sorrell selectively quotes cases concerning the altogether different question of how to determine whether an issue was adequately raised *on the merits* in the state court when the decision under review did not address the issue. Opp. 10; *see Adams*, 520 U.S. at 86; *Street* v. *New York*, 394 U.S. 576, 581-82 (1969). In that context, this Court requires only that the "'petitioner's federal claim ... was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Campbell* v. *Louisiana*, 523 U.S. 392, 403 (1998). Here, that requirement was fully satisfied.

Petition demonstrate that an instruction requiring the jury to specify its apportionment of liability is necessary to vindicate a FELA defendant's right to the proper allocation of damages. This Court has affirmed FELA defendants' right to a proper apportionment, see Pet. 19; *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 121-22 (1913), and the courts of appeals have recognized that it is through special verdict forms that this right is vindicated, Pet. 20-21 & n.12. That some of these courts point to Federal Rule of Civil Procedure 49 as the customary authority for special verdict forms in no way undercuts their relevance. They do not "merely comment" that a special verdict form would have been helpful, Opp. 11; they reverse because the verdict could not be affirmed in the absence of a special verdict form, or recognize that a special verdict is necessary for an appellate court to determine what the jury did.

Notably, Sorrell does not attempt to justify the Missouri Supreme Court's bizarre rule of discriminating against FELA defendants' statutory right to an offset for comparative negligence. Missouri *requires* special verdict forms for comparative negligence in non-FELA cases, but *prohibits* such forms in FELA cases. Pet. 21-22. There is no possible rationale for this rule, and Sorrell offers none. This rule violates the bedrock principle that "[a] state may not discriminate against rights arising under federal law." *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 233 (1934). Moreover, the lower court's implementation of this discriminatory rule was yet again justified by reference to the binding nature of the Missouri jury instructions, with no analysis of what federal law requires, Pet. App. 17a-18a, in further violation of *Dickerson*, 470 U.S. at 411. For this reason, too, this Court's review is warranted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the Court may wish to consider summary reversal.

Respectfully submitted,

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April 17, 2005

No. 05-746

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Writ of Certiorari to the Missouri Court of Appeals

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PETITION FOR CERTIORARI FILED DECEMBER 7, 2005
CERTIORARI GRANTED MAY 15, 2006

TABLE OF CONTENTS

	Page
Eastern District Court of Appeals, City of St. Louis, Relevant Docket Entries	1
Missouri Court of Appeals, Eastern District, Relevant Docket Entries	5
Supreme Court of Missouri, Relevant Docket Entries	7
Trial Transcript, *Sorrell* v. *Norfolk S. Ry.*, Cause No. 012-8583 (E.D. Ct. App. St. Louis Nov. 3-7, 2003) (excerpted from pages 631-34)	8
Defendant's Proposed Instruction No. A, *Sorrell* v. *Norfolk S. Ry.*, Cause No. 012-8583 (E.D. Ct. App. St. Louis Nov. 7, 2003)	11
List of Jury Instructions, *Sorrell* v. *Norfolk S. Ry.*, Cause No. 012-8583 (E.D. Ct. App. St. Louis Nov. 7, 2003)	12
Jury Instructions Nos. 11-15, *Sorrell* v. *Norfolk S. Ry.*, Cause No. 012-08583 (E.D. Ct. App. St. Louis Nov. 7, 2003)	13
Verdict Form B, *Sorrell* v. *Norfolk S. Ry.*, Cause No. 012-8583 (E.D. Ct. App. St. Louis Nov. 7, 2003)	18
Defendant's Motion For New Trial, *Sorrell* v. *Norfolk S. Ry.*, Cause No. 012-08583 (E.D. Ct. App. St. Louis Dec. 5, 2003) (excerpt)	19

NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 05-746 Petition For A Writ Of Certiorari.

Sorrell v. *Norfolk S. Ry.*, 170 S.W.3d 35 (Mo. Ct. App. 2005) 1a-2a

Sorrell v. *Norfolk S. Ry.*, No. ED84268 (Mo. Ct. App. July 5, 2005) (memorandum supplementing order) 3a-21a

Completed Verdict Form B, *Sorrell* v. *Norfolk S. Ry.*, Cause No. 012-8583 (E.D. Ct. App. St. Louis Nov. 7, 2003) 26a

EASTERN DISTRICT COURT OF APPEALS
CITY OF ST. LOUIS

Cause No. 012-08583

TIMOTHY SORRELL,

Plaintiff,

v.

NORFOLK SOUTHERN RAILROAD COMPANY,

Defendant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/02/01	Summons to ST LOUIS COUNTY issued for D001–NORFOLK SOUTHERN RAILWAY COMPANY.
	* * * *
11/03/03	Cause called, Plaintiff appears in person and by Attorney Paul Slocomb. Defendant appears in person and by Attorney David Dick. The court orders the court reporter to take notes to preserve the evidence. Panel of thirty (32) jurors called. Instructions partially read to panel. Jury Panel sworn, Instructions completed. Examination of jury panel on voir dire begun and not concluded. Jury admonished. Court is in luncheon recess. Examination of jury panel on voir dire continues and not concluded. Recess called. Jury admonished. Examination of jury panel on voir dire continued and is concluded. Recess called. Jury of twelve and two alternates selected but not

DATE	PROCEEDINGS
	sworn. Jury admonished. Court is adjourned until November 4, 2003 at 9 o'clock a.m.. SO ORDERED: Judge Joan M. Burger–24764. Joanne Martin is the court reporter.
11/04/03	Cause again called, parties and jury again appear. Jury trial resumes. Jury of twelve and two alternates sworn. Instructions read. Opening statements made by counsel for plaintiff and defendant. Evidence of plaintiff's witnesses begun and not concluded. Jury admonished. Court is in luncheon recess. Evidence of plaintiff's witnesses continues and not concluded. Recess called. Jury admonished. Evidence of plaintiff's witnesses continues and not concluded. Recess called. Jury admonished. Court is adjourned until November 5, 2003 at 9 o'clock a.m. SO ORDERED: Judge Joan M. Burger. Joanne Martin is the court reporter.
11/05/03	Cause again called, parties and jury again appear. Jury trial resumes. Evidence of plaintiff's witnesses continues and not concluded. Recess called. Jury admonished. Evidence of plaintiff's witnesses continues and not concluded. Jury admonished. Court is in luncheon recess. Evidence of plaintiff's witnesses continues and not concluded. Recess called. Jury admonished. Evidence of plaintiff's witnesses continues and is concluded. Plaintiff rests. Recess called. Jury admonished. Court is adjourned until November 6, 2003 at 9 o'clock a.m. SO ORDERED: Judge Joan M. Burger–24764. Joanne Martin is the court reporter.

DATE	PROCEEDINGS
11/06/03	D001–NORFOLK SOUTHERN RAILWAY COMPANY objections to the use of MAI 8.02 and MAI 36.01 as violating the United States Constitution filed.
11/06/03	Cause again called, parties and jury again appear. Jury trial resumes. Plaintiff reopens case. Evidence of plaintiff's witnesses continues and is concluded. Plaintiff rests. At the close of plaintiff's case oral motion for directed verdict is heard and denied. Evidence of defendant's witnesses begun and not concluded. Recess called. Jury admonished. Evidence of defendant's witnesses continues and is concluded. Defense rests. At the close of the entire case oral motion for directed verdict heard and denied. Rebuttal evidence begun and is concluded. Jury admonished. Court is in luncheon recess. Instructions read. Arguments made by counsels for plaintiff and defendant. Sheriff sworn. Jury retires to deliberate at 2:48 p.m.. At 4 o'clock p.m. recess called. Overnight instructions read. Jury admonished. Court is adjourned until November 7, 2003 at 9 o'clock a.m.. SO ORDERED: Judge Joan M. Burger–24764. Joanne Martin is the court reporter.
11/07/03	Cause again called, parties and jury again appear. Jury trial resumes. Jury returns at 9:30 a.m. from evening recess and continues deliberation. At 9:45 a.m. question from the jury received and answered by the court. At 10:30 a.m. jury returnes a verdict as follows: VERDICT-A- Whereas on the claim of Timothy Sorrell for 10-29-99 injury against Norfolk Southern Railway Co. the jury

DATE	PROCEEDINGS
	found in favor of plaintiff. The jury found the total damages of plaintiff to be 0. VERDICT-B-Where as on the claim of plaintiff for the 11-1-99 injury against defendant the jury found in favor of plaintiff. The jury found the total damages of plaintiff to be $1,500,000.00. Wherefore it is hereby ordered and adjudged that plaintiff have and recover of defendant 1,500,000,00. Cost of this action to be taxed against defendant. Jury polled and discharged. Jury list, jury panel list, instructions, questions and sheriff's fees received and filed. SO ORDERED: Judge Joan M. Burger-24764. Joanne Martin is the court reporter.
	* * * *
12/05/03	D001–NORFOLK SOUTHERN RAILWAY COMPANY Motion for new trial filed.
	* * * *
12/19/03	Memorandum in opposition to TO defendant's motion for a new trial.
	* * * *
2/23/04	24764–JUDGE JOAN BURGER – D001–NORFOLK SOUTHERN RAILWAY COMPANY motion FOR NEW TRIAL IS DENIED PER COURT ORDER FILED.
	* * * *
3/11/04	Notice of Appeal sent to Missouri Court of Appeals by certified mail number 70023150000121554491. Copy of notice of appeal sent to Paul Slocomb, by certified mail number 70023150000121554477.
	* * * *

MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. ED84268

TIMOTHY SORRELL,
Respondent,

v.

NORFOLK SOUTHERN RAILROAD COMPANY,
Appellant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
03/04/2004	NOA Filed in Circuit Court
	* * * *
03/15/2004	NOA Filed in Appellate Court
	* * * *
10/18/2004	Appellant's Brief, Filing Party: DICK, DAVID ALLEN
	* * * *
12/10/004	Respondent's Brief, Filing Party: SCHLICHTER, JEROME J
	* * * *
01/11/2005	Appellant's Reply Brief, Filing Party: ERWIN, JAMES W
02/08/2005	Case Submitted, Associated Events: 02/08/2005—Oral Argument

DATE	PROCEEDINGS
07/05/2005	Opinion-Affirmed
	Per Curiam Order Opinion
07/20/2005	Mot for Rehearing/Tran to SC, Filing Party: ERWIN, JAMES W
	* * * *
08/22/2005	Denied
	* * * *
09/02/2005	Appl for Tran SC Filed in SC, Filing Party: DICK, DAVID ALLEN
	* * * *
09/20/2005	Denied
	* * * *

SUPREME COURT OF MISSOURI

No. SC87089

TIMOTHY SORRELL,

Respondent,

v.

NORFOLK SOUTHERN RAILROAD COMPANY,

Appellant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
09/06/2005	Appl for Tran SC Filed in SC, Filing Party: DICK, DAVID ALLEN, Associated Filing Parties: NORFOLK SOUTHERN RAILWAY COMPANY
	* * * *
09/20/2005	Disp-App Tran to SC Denied, MANDATE SENT TO CLERK, MISSOURI COURT OF APPEALS; COPIES SENT TO COUNSEL OF RECORD

IN THE EASTERN DISTRICT COURT OF APPEALS
CITY OF ST. LOUIS

Cause No. 012-8583

TIM SORRELL,
Plaintiff-Respondent,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellant.

Before the Honorable Joan M. Burger

TRANSCRIPT ON APPEAL
November 3-7, 2003

---

* * * *

[631] THE COURT: Do you have, do you have any objections to the instructions? At the instruction conference the Court forgot to ask if there were any objections.

I asked for additional instructions and I received those from the defendant. I did not ask [632] for objections.

Are there objections to the instructions the court intends to give?

MR. DICK: Yes, Judge. I have just a couple.

It's noted in our motion for directed verdict, but in an abundance of caution we would renew the motion for directed verdict at the close of the evidence that we filed at the close of the defendant's case.

THE COURT: Yes. Your motion, including now the five minutes of rebuttal, is overruled.

MR. DICK: No change in that.

MR. SLOCOMB: I move for a directed verdict on the issue of mitigation of damages.

I don't believe the defendant has made a submissible case under FELA for mitigation of damages on either court.

THE COURT: Your motion is denied.

MR. DICK: Judge, as far as any objection to the jury instructions, my only objection is as to Instruction 8.

My objection is not to the form of it, but as stated in the motion for directed verdict—oh, it's not 8. I'm talking about another one.

I apologize. My objection is to [633] Instruction 12 as stated in the motion for directed verdict.

Judge, we believe there is no connection between any failure of Norfolk Southern to provide Mr. Sorrell with a reasonably safe place to work or as far as causing his injuries.

If his injuries were caused by any negligence, caused by the negligent driving of Keith Woodin, I agree plaintiff has made a submissible case and Mr. Woodin is negligent.

With whether Norfolk Southern failed to provide a reasonably safe place to work, we believe there is no sufficient causal connection.

THE COURT: Your objection is overruled.

MR. DICK: And, Judge, Instruction 13, contributory fault.

As we discussed earlier, we did have the objection about the words directly contributed to cause versus resulted in whole or in part from as a result of plaintiff's verdict director.

THE COURT: That's overruled.

MR. DICK: I wanted to note that objection for the record. I think I stated it earlier. I don't think I specifically referred to Instruction 13 when I did that.

[634] THE COURT: That's overruled.

MR. DICK: Because the language of the verdict director in paragraph third of Instruction 13 does not, is inconsistent with the law 45 U.S. Code Section 51 and Section 53.

And then we have an objection to Instruction 14, the damage instruction. And the objection also goes to verdict form B.

And our objection is as we previously discussed on the record before and it is stated in the written memorandum.

THE COURT: You can just refer to your lengthy objection that is filed with the Court, file-stamped today, and contains all your objections under the Constitutional provisions, correct?

MR. DICK: Correct. And we tendered Instructions B and C and we understand those are overruled.

* * * *

INSTRUCTION NO. A

[Filed Nov. 7, 2003]

You must find plaintiff contributorily negligent on his November 1, 1999 injury claim if you believe:

First, plaintiff either:

failed to stop his truck, or

failed to keep his truck on the roadway, and

Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence of plaintiff contributed in whole or in part to cause his injury.

INSTRUCTION REFUSED

/s/ Joan M. Burger
JOAN M. BURGER
Circuit Judge
11/6/03

Defendant's Instruction No. A

Modified MAI 32.07(B), paragraph Third modified in light of language of 45 U.S.C. sections 51 and 53 and FELA pure comparative fault system.

LIST OF INSTRUCTIONS

1. 2.01
2. 2.03
3. 2.02
4. 3.01
5. 11.07
6. 2.04

Package 1

7. 2.05
8. 24.01
9. 8.02
10. 32.07 (A)

Verdict Form A 36.01

Package 2

11. 2.05
12. 24.01
13. 32.07 (B)
14. 8.02
15. 32.07 (A)

Verdict Form B

INSTRUCTION NO. 11

Instructions 11 through 15 and the general instructions 1 through 6 apply to the claim of plaintiff Timothy Sorrell's personal injury on or about November 1, 1999. Use Verdict B to return your verdict on this claim.

Plaintiff's Instruction No. ___
M.A.I. 2.05 [1980 Revision]

INSTRUCTION NO. 12

Your verdict must be for plaintiff Timothy Sorrell if you believe:

First, that on November 1, 1999, defendant Norfolk Southern Railway Company's employee failed to use ordinary care or defendant Norfolk Southern Railway Company failed to provide Plaintiff with reasonably safe methods for work, and

Second, defendant in any one or more of the respects submitted in paragraph First was negligent, and

Third, such negligence resulted in whole or in part in injury to plaintiff.

Plaintiff's Instruction No. ____
M.A.I. 24.01 [1992 Revision]

INSTRUCTION NO. 13

You must find plaintiff contributorily negligent on his November 1, 1999 injury claim if you believe:

First, plaintiff either:

failed to stop his truck, or

failed to keep his truck on the roadway, and

Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

Defendant's Instruction No. ____
MAI 32.07(B)

INSTRUCTION NO. 14

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax. If you find that plaintiff failed to mitigate damages as submitted in Instruction Number 15, in determining plaintiff's total damages you must not include those damages which would not have occurred without such failure. If you find plaintiff contributorily negligent as submitted in Instruction Number 13, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.

Plaintiff's Instruction No. ___
M.A.I. 8.02 [1996 Revision]

INSTRUCTION NO. 15

If you find in favor of plaintiff on his November 1, 1999 injury claim, you must find that plaintiff failed to mitigate damages if you believe:

First, plaintiff either:

failed to obtain employment, or

failed to take steps to obtain employment, and

Second, plaintiff thereby failed to use ordinary care, and

Third, plaintiff thereby sustained damage which would not have occurred otherwise.

Defendant's Instruction No. ___
M.A.I. 32.07(A)

VERDICT B

Note: Complete this form by writing in the name required by your verdict.

On the November 1, 1999 claim of plaintiff Timothy Sorrell for personal injuries against defendant Norfolk Southern Railway Company, we, the undersigned jurors, find in favor of:

_____ _____

(Plaintiff Timothy Sorrell) or (Defendant Norfolk Southern Railway Company)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Timothy Sorrell.

We, the undersigned jurors, assess the damages of plaintiff Timothy Sorrell at $_____.

Note: All jurors who agree to the above findings must sign below.

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

Plaintiff's Instruction No. ___
M.A.I. 36.01 [1980 Revision]

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

[Filed DEC 5, 2003]

Cause No: 012-08583
Division No. 13

TIMOTHY SORRELL,

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW Defendant Norfolk Southern Railway Company, pursuant to Missouri Rule of Civil Procedure 78.01, requests the Court grant a new trial with respect to Plaintiff's Count I claim arising out of his November 1, 1999 incident, on one or more of the following grounds:

1. The jury decided two separate claims filed pursuant to the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* On November 7, 2003, the jury returned a verdict in favor of Plaintiff on his claim arising out of the October 20, 2003 incident, but awarded $0 damages, and returned a verdict of $1.5 million on Plaintiff's claim arising out of the November 1, 1999 incident. Much of Plaintiff's evidence and much of his economic loss claim focused upon the replacement costs of health insurance for him and for his wife. Plaintiff's wife suffers from progressive multiple sclerosis, a fact presented to the jury. Plaintiff was allowed to present evidence and argue to the jury that Plaintiff Sorrell *and* his wife would be required to pay around $360,000, not including future cost increases, for health insurance until Mr. Sorrell

reaches the age of 65. The jury heard evidence of separate calculations for future insurance costs for both Plaintiff *and* his wife, $165,389 for Plaintiff and $198,503 for his wife.

The Court Erred in Applying MAI 32.07(B), Which Misstates Federal Law

2. The Court erred in rejecting Defendant's Tendered Instruction A and giving Instruction 13, based upon MAI 32.07(B). Paragraph Three of MAI 32.07(B) misstates the applicable causation standard under the FELA. Taken together, MAI 32.07(B) (as submitted in Instruction 13) and MAI 24.01 (as submitted in Instruction 12) misstate the standards of causation applicable under the FELA and improperly impose upon the defendant a higher burden of proving causation. The approved version of MAI 32.07(B) states a causation standard of "directly contributed to cause;" the approved version of MAI 24.01 states a causation standard of "contributed in whole or in part." The FELA imposes a pure comparative fault system, with the same standard of causation governing both the defendant's and the plaintiffs fault. *See* 45 U.S.C. § 51 and 53; *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1282-83 (3d Cir. 1995); *Gavagan v. United States*, 955 F.2d 1016, 1019 n.7 (5th Cir. 1992) ("[T]he same general negligence . . . and causation standards apply to both employer and employee in Federal Employers' Liability Act . . . cases."). Thus, Instruction 13 and MAI 32.07(B) misstate the law by imposing a much higher standard of causation ("directly contributed") upon the defendant than the standard imposed upon the plaintiff in Instruction 12 and MAI 24.01 ("contributed in whole or in part").

* * * *

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(5)

No. 05-746

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Writ of Certiorari to the Missouri Court of Appeals

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QUESTION PRESENTED

Whether the court below erred in determining that the causation standard for railroad *negligence* under the Federal Employers Liability Act ("FELA") differs from the causation standard for employee *contributory negligence*.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

Norfolk Southern Railway Company has a parent company, the Norfolk Southern Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
A. Statutory Background	1
B. Factual Background	5
C. Proceedings Below	6
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. UNDER FELA, THE CAUSATION STANDARDS FOR NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE ARE THE SAME	10
A. The Common Law At The Time FELA Was Enacted Employed The Same Proximate-Cause Standard For Negligence And For Contributory Negligence	12
B. Modern Contributory And Comparative Negligence Schemes Apply The Same Causation Standards To Defendant And Plaintiff Negligence	19

TABLE OF CONTENTS—continued

Page

C. Divergent Causation Standards Are Inconsistent With The FELA System Of Comparative Negligence, Which Apportions Damages Based On Relative Fault (Not Relative Causation) 22

II. DIVERGENT CAUSATION STANDARDS CANNOT BE JUSTIFIED ON THE GROUNDS THAT SECTION 1 ABROGATED THE PROXIMATE CAUSE RULE FOR RAILROAD NEGLIGENCE 25

A. This Court Has Long Held, In Keeping With FELA's Plain Language, That Plaintiffs Must Prove That Railroad Negligence Proximately Caused Their Injury 26

B. *Rogers* Did Not *Sub Silentio* Overrule Decades Of Precedent Establishing A Federal Rule Of Proximate Cause Under FELA 34

C. Applying Equivalent Proximate-Cause Standards To Defendant Negligence And Plaintiff Contributory Negligence Is The Best Rule As A Matter Of Policy 42

1. Proximate Cause Is Widely Recognized As A Fundamentally Just Standard 42

2. Divergent Causation Standards Are Inequitable And Hard To Administer 47

CONCLUSION 50

TABLE OF AUTHORITIES

CASES Page

Aktieselskabet Cuzco v. *The Sucarseco*, 294 U.S. 394 (1935) 17
Anza v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006) 42, 44
Associated Gen. Contractors of Cal., Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 13, 33, 43
Astoria Fed. Sav. & Loan v. *Solimino*, 501 U.S. 104 (1991) 12
Atchison, Topeka & Santa Fe Ry. v. *Buell*, 480 U.S. 557 (1987) 1
Atchison, Topeka & Santa Fe Ry. v. *Henry*, 45 P. 576 (Kan. 1896) 16
Atlantic Coast Line R.R. v. *McIntosh*, 198 So. 92 (Fla. 1940) 39
Bailey v. *Central Vt. Ry.*, 319 U.S. 350 (1943) 32
Bailey v. *Norfolk & W. Ry.*, 942 S.W.2d 404 (Mo. Ct. App. 1997) 47
Baltimore & Ohio R.R. v. *Kreager*, 56 N.E. 203 (Ohio 1899) 31
Barrickman v. *Marion Oil Co.*, 32 S.E. 327 (W. Va. 1898) 31
Beard v. *Railway Express Agency, Inc.*, 323 S.W.2d 732 (Mo. 1959) 26
Blue Shield of Va. v. *McCready*, 457 U.S. 465 (1982) 46
Bolin v. *Chicago, St. Paul., Minneapolis & Omaha. Ry.*, 84 N.W. 446 (Wis. 1900) 31
Brady v. *Southern Ry.*, 320 U.S. 476 (1943) ... 27, 38, 45
Brady v. *Terminal R.R. Ass'n*, 303 U.S. 10 (1938) 28, 41
Brown v. *Western Ry. of Ala.*, 338 U.S. 294 (1949) 28

TABLE OF AUTHORITIES—continued

Page

Bueche v. *Kansas City*, 492 S.W.2d 835 (Mo. 1973) 4
Carter v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949) 18, 24, 28, 39, 45
Chesapeake & Ohio Ry. v. *Stapleton*, 279 U.S. 587 (1929) 2
Cicero & Proviso Street Ry. v. *Meixner*, 43 N.E. 823 (Ill. 1895) 16
Consolidated Rail Corp. v. *Gottshall*, 512 U.S. 532 (1994) 2, 11, 41, 45
Cooper v. *Georgia, Carolina & N. Ry.*, 39 S.E. 543 (S.C. 1901) 31
Coray v. *Southern Pac. Co.*, 335 U.S. 520 (1949) 28, 35, 36, 39
Cornovski v. *St. Louis Transit Co.*, 106 S.W. 51 (Mo. 1907) 31
Crane v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164 (1969) 41
Davis v. *Wolfe*, 263 U.S. 239 (1923)... 27, 28, 38, 41, 45
Denver & Rio Grande R.R. v. *Peterson*, 69 P. 578 (Colo. 1902) 31
Dura Pharms. v. *Broudo*, 544 U.S. 336 (2005) 42, 44
Edelman v. *Jordan*, 415 U.S. 651 (1974) 40
Ellis v. *Union Pac. Ry.*, 329 U.S. 649 (1947) 45
Exxon Co., U.S.A. v. *Sofec, Inc.*, 517 U.S. 830 (1996) 20, 42, 43
Ferguson v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957) 2, 39, 40
Fish v. *Chicago Rock Island & Pac. Ry.*, 172 S.W. 340 (Mo. 1914) 5
Florida Cent. & Pac. R.R. v. *Williams*, 20 So. 558 (Fla. 1896) 16
The Francis Wright, 105 U.S. 381 (1881) 17
The G.R. Booth, 171 U.S. 450 (1898) 17

TABLE OF AUTHORITIES—continued

Page

Galena & Chi. Union R.R. v. *Jacobs*, 20 Ill. 478, 1858 WL 6123 (1858) 16
Ganotis v. *NewYork Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965) 23
Georgia R.R. & Banking Co. v. *Neely*, 56 Ga. 540, 1876 WL 3277 (1876) 31
Gila Valley Globe & Northern Ry. v. *Lyon*, 80 P. 337 (Ariz. 1905), *aff'd*, 203 U.S. 465 (1906) 31
Grand Trunk R.R. v. *Ives*, 144 U.S. 408 (1891) 13
Grand Trunk W. Ry. v. *Lindsay*, 233 U.S. 42 (1914) 3, 23
Gulf, Colo. & Santa Fe Ry. v. *Shieder*, 30 S.W. 902 (Tex. 1895) 31
Guthrie v. *Maine Cent. R.R.*, 18 A. 295 (Me. 1889) 31
Hines v. *Sweeney*, 201 P. 165 (Wyo. 1921) 38
Holmes v. *Securities Investor Prot. Corp.*, 503 U.S. 258 (1992) 42, 44
Howard v. *Illinois Cent. R.R. (Employers' Liab. Cases)*, 207 U.S. 463 (1908) 16
Humphrey's Executor v. *Myers*, 295 U.S. 602 (1935) 41
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 40
Illinois Cent. R.R. v. *Skaggs*, 240 U.S. 66 (1916) 22, 23, 30
Inman v. *Baltimore & Ohio Ry.*, 361 U.S. 138 (1959) 45
Jacksonville Street Ry. v. *Chappell*, 21 Fla. 175, 1885 WL 1758 (1885) 31
Jahn v. *The Folmina*, 212 U.S. 354 (1909) 17
Johnson v. *Offshore Express, Inc.*, 845 F.2d 1347 (5th Cir. 1988) 44
Kernan v. *American Dredging Co.*, 355 U.S. 426 (1958) 41

TABLE OF AUTHORITIES—continued

Page

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Lea v. *Southern Pub. Utils. Co.*, 97 S.E. 492 (N.C. 1918) 18

Leake v. *Burlington N. R.R.*, 892 S.W.2d 359 (Mo. Ct. App. 1995) 4, 5

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The Manitoba, 122 U.S. 97 (1887) 17

Manson v. *Great N. Ry.*, 155 N.W. 32 (N.D. 1915) 29

Mayor of Knoxville v. *Cox*, 53 S.W. 734 (Tenn. 1899) 31

The Max Morris v. *Curry*, 137 U.S. 1 (1890) 17

Memphis & Charleston R.R. v. *Jobe*, 10 So. 672 (Miss. 1891) 31

Minneapolis, St. Paul & Sault Saint Marie Ry. v. *Rock*, 279 U.S. 410 (1929) 3

Minneapolis, St. Paul & Sault Ste. Marie Ry. v. *Goneau*, 269 U.S. 406 (1926) 29

Mobile & Ohio R.R. v. *Campbell*, 75 So. 554 (Miss. 1917) 30, 36

Mondou v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1 (1912) 2, 3

Monessen Sw. Ry. v. *Morgan*, 486 U.S. 330 (1988) 11, 32

Nelson v. *Northern Pac. Ry.*, 148 P. 388 (Mont. 1915) 29

New York Cent. R.R. v. *Ambrose*, 280 U.S. 486 (1930) 28

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TABLE OF AUTHORITIES—continued

Page

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Norfolk & W. Ry. v. *Ayers*, 538 U.S. 135 (2003) 3, 17, 19, 32, 49

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O'Donnell v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384 (1949) 28, 46

O'Melveny & Myers v. *FDIC*, 512 U.S. 79 (1994) 32

Page v. *St. Louis Sw. Ry.*, 349 F.2d 820 (5th Cir. 1965) 50

Palsgraf v. *Long Island R.R.*, 248 N.Y. 339 (N.Y. 1928) 45

Paquin v. *Wisconsin Cent. Ry.*, 108 N.W. 882 (Minn. 1906) 31

Park v. *O'Brien*, 23 Conn. 339, 1854 WL 818 (1854) 31

Parker v. *Atchison, Topeka & Santa Fe Ry.*, 70 Cal. Rptr. 8 (Cal. Ct. App. 1968) 47

Pendroy v. *Great N. Ry.*, 117 N.W. 531 (N.D. 1908) 31

Peters v. *CSX Transp., Inc.*, No. 04-cv-077, 2006 WL 42179 (W.D. Ky. Jan. 3, 2006) 47

Porter v. *Bangor & Aroostook R.R.*, 75 F.3d 70 (1st Cir. 1996) 44

Ricker v. *Freeman*, 50 N.H. 420, 1870 WL 3123 (1870) 31

Ricketts v. *Kansas City Stockyards Co. of Me.*, 484 S.W.2d 216 (Mo. 1972) 4, 26

TABLE OF AUTHORITIES—continued

Page

Ridge v. *Norfolk S. R.R.*, 83 S.E. 762 (N.C. 1914) 18

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Rogers v. *Missouri Pac. Ry.*, 352 U.S. 500 (1957) ..... *passim*

Rosevear v. *Borough of Osceola Mills*, 32 A. 548 (Pa. 1895) 31

Southern Ry. v. *Howell*, 34 So. 6 (Ala. 1903) 31

Sawyer v. *Sauer*, 10 Kan. 466, 1872 WL 722 (1872) 16

Schneider v. *Market Street Ry.*, 66 P. 734 (Cal. 1901) 31

Seaboard Air Line Ry. v. *Tilghman*, 237 U.S. 499 (1915) 3, 14, 24

Seaboard Shipping Corp. v. *Inland Waterways Corp. (In re Seaboard Shipping Corp.)*, 449 F.2d 132 (2d Cir. 1971) 20

Snyder v. *Chicago, Rock Island & Pac. R.R.*, 521 S.W.2d 161 (Mo. Ct. App. 1973) 4, 5

Southern Pac. Co. v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918) 12, 43

Southern Ry. v. *Foote Mineral Co.*, 384 F.2d 224 (6th Cir. 1967) 20

Southern Ry. v. *Watson*, 30 S.E. 818 (Ga. 1898) 17

Spokane & Inland Empire R.R. v. *Campbell*, 241 U.S. 497 (1916) 18, 29

St. Louis, Iron Mountain & S. Ry. v. *McWhirter*, 229 U.S. 265 (1913) 28

St. Louis, Iron Mountain & S. Ry. v. *Coolidge*, 83 S.W. 333 (Ark. 1904) 31

St. Louis & S.F. R.R. v. *Conarty*, 238 U.S. 243 (1915) 28

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TABLE OF AUTHORITIES—continued

Page

St. Louis Sw. Ry. v. *Dickerson*, 470 U.S. 409 (1985) 25
Standard Oil Co. of N.J. v. *United States*, 340 U.S. 54 (1950) 46
Stratton v. *Central City Horse Ry.*, 95 Ill. 25, 1880 WL 10004 (1880) 16
Stringfellow v. *Atlantic Coast Line R.R.*, 290 U.S. 322 (1933) 16, 36
Stucke v. *Milwaukee & Miss. R.R.*, 9 Wis. 202, 1859 WL 2832 (1859) 16
Swinson v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529 (1935) 28
Tennant v. *Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944) 27
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) ..... *passim*
Trickey v. *Clark*, 93 P. 457 (Or. 1908) 31
Union Oil Co. of Cal. v. *The San Jacinto*, 409 U.S. 140 (1972) 21
Union Pac. R.R. v. *Hadley*, 246 U.S. 330 (1918) 29
United States v. *Ron Pair Enter., Inc.*, 489 U.S. 235 (1989) 10
United States v. *Texas*, 507 U.S. 529 (1993) 12
United States v. *Wells*, 519 U.S. 482 (1997) 10
Urie v. *Thompson*, 337 U.S. 163 (1949) 2, 11, 28
Wilmoth v. *Chicago, Rock Island & Pac. R.R.*, 486 S.W.2d 631 (Mo. 1972) 4

STATUTES

Act of June 11, 1906, ch. 3073, 34 Stat. 232 16
FELA Amendments Act, ch. 685, 53 Stat. 1404 (1939) 22
15 U.S.C. § 15 43
45 U.S.C. § 51 ..... *passim*

TABLE OF AUTHORITIES—continued

	Page
45 U.S.C. §§ 51-60	1
§ 53	*passim*
Fla. Stat. § 2345 (1892)	15
1910 Miss. Laws 125	15
1907 N.D. Laws 333	16
1908 Ohio Laws 25	16
1907 S.D. Sess. Laws 455	17
RULE	
Mo. R. Civ. P. 70.02(b)	4
LEGISLATIVE HISTORY	
Hearing Before the H. Comm. on the Judiciary, 76th Cong. (Apr. 17, 1939)	33
S. Rep. No. 76-661 (1939)	23
H.R. Rep. No. 59-2335 (1906)	22
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TABLE OF AUTHORITIES—continued

Page

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TABLE OF AUTHORITIES—continued

Page

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OTHER AUTHORITIES

Missouri Approved Jury Instructions (6th ed. 2002) 26, 49

Restatement of Torts (1934) 13

Restatement (Second) of Torts (1965) 19, 35, 42, 44

Restatement (Third) of Torts: Apportionment of Liability (2000) 19, 20, 42, 48

Uniform Comparative Fault Act (1977) (amended 1979) 20

OPINIONS BELOW

The order of the Missouri Court of Appeals affirming the judgment of the trial court is published at 170 S.W.3d 35 (Mo. Ct. App. 2005) (per curiam), and is reproduced in the Petition Appendix ("Pet. App.") at 1a-2a. That order was accompanied by an unpublished opinion, which is reproduced at Pet. App. 3a-21a. The Missouri Court of Appeals' order denying rehearing and/or transfer to the Missouri Supreme Court is reproduced at Pet. App. 32a. The order of the Missouri Supreme Court denying an application for transfer from the Missouri Court of Appeals is reproduced at Pet. App. 31a.

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on July 5, 2005. Pet. App. 1a. The Missouri Court of Appeals denied rehearing and transfer to the Missouri Supreme Court on August 22, 2005. Pet. App. 32a. The Missouri Supreme Court denied transfer on September 20, 2005. Pet. App. 31a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, are reproduced at Pet. App. 33a-34a. Missouri Approved Instructions ("MAI") 8.02, 24.01, 32.07(B), 36.01 and 37.07 are reproduced at Pet. App. 35a-38a.

STATEMENT OF THE CASE

A. Statutory Background

1. Congress enacted FELA "to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees." *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 561 (1987). FELA is not, and was not meant to be, a no-fault

worker's compensation system. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994). Unlike worker's compensation laws, FELA requires a plaintiff to prove common-law negligence (rather than imposing no-fault liability on the employer), and permits plaintiffs to recover tort damages (rather than scheduled benefits). Section 1 of FELA makes "[e]very common carrier by railroad ... liable in damages" for the injury or death of an employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. As a result of this tort liability system, FELA is the exclusive remedial scheme for such injuries. There is no worker's compensation program for railroad employees, see *Gottshall*, 512 U.S. at 543; *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 538-39 (1957) (Frankfurter, J., dissenting), and state remedies are preempted, *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 55 (1912).

Under FELA, "[t]he rights and obligations of the petitioner depend upon that Act and applicable principles of common law as interpreted by the federal courts." *Chesapeake & Ohio Ry.* v. *Stapleton*, 279 U.S. 587, 590 (1929). The federal common law of FELA is derived from prevailing common-law principles, except where Congress explicitly departed from those rules. See *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949) ("the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms"); *Gottshall*, 512 U.S. at 541-42. In enacting FELA in 1908, Congress expressly supplanted five common-law tort doctrines: it (1) abolished "the fellow-servant rule," which prevented workers from recovering any damages for injuries caused by a coworker's negligence; (2) rejected contributory negligence as an absolute defense to liability, instead making it a rule for apportionment of damages (except where liability is based on a violation of a safety statute); (3) abolished the defense of assumption of the risk when liability was based on

a violation of a safety statute; (4) abolished the rule against recovery for wrongful death; and (5) abolished the power of railroads to limit their liability by contract. See *Mondou*, 223 U.S. at 49-50; *Minneapolis, St. Paul & Sault Saint Marie Ry.* v. *Rock*, 279 U.S. 410, 413 (1929); *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003); 42 Cong. Rec. 4226, 4227 (1908) (statement of Rep. Henry). In 1939, Congress abolished the defense of assumption of the risk in all FELA cases. *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 66-67 (1943).

At issue here is the second of these abrogated common law principles: Congress's directive in section 3 of the Act that contributory negligence shall not bar a recovery, but that the damages shall be diminished by the jury "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. At common law, a plaintiff's contributory negligence was "a complete bar or defense" to recovery. *Seaboard Air Line Ry.* v. *Tilghman*, 237 U.S. 499, 500 (1915). As the language of section 3 makes plain, Congress replaced this "strict rule of contributory negligence," *Tiller*, 318 U.S. at 62, with a regime of comparative negligence, by which a plaintiff's contributory negligence merely diminishes recovery, and does not foreclose it. *Grand Trunk W. Ry.* v. *Lindsay*, 233 U.S. 42, 49 (1914). This modification of the common-law rule was motivated by concerns of simple justice: It made "each party responsible for his own negligence, and require[d] each to bear the burden thereof." H.R. Rep. No. 60-1386, at 1 (1908); see also *id.* at 5 ("What can be more fair than that each party shall suffer the consequences of his own carelessness?").

Yet, while Congress did modify this aspect of the contributory-negligence rule, it did not change the common-law causation standards that apply to negligence claims. At common law, the defendant's negligence and the plaintiff's contributory negligence were measured by the same causal yardstick—to justify (or prevent) recovery, the negligence (or contributory negligence) must be a proximate cause of the

plaintiff's injury. Nothing in the text or legislative history of FELA evinces any intention to modify these well-recognized standards.

2. In conflict with the common-law rule, the Missouri Supreme Court has promulgated jury instructions that employ different causation standards for negligence and contributory negligence under FELA. These jury instructions are binding on the lower Missouri courts. *Bueche* v. *Kansas City*, 492 S.W.2d 835, 840 (Mo. 1973); Mo. R. Civ. P. 70.02(b). The Missouri Approved Instruction for FELA negligence requires the plaintiff to prove that the railroad's "negligence resulted in whole or in part in [injury to plaintiff]." MAI 24.01 (footnote omitted) (brackets in original) (Pet. App. 35a-36a).[1] Although the instruction tracks the statutory language, see 45 U.S.C. § 51, the Missouri courts have interpreted the language of the statute and the instruction to abrogate the rule of proximate cause that prevailed at common law. *Ricketts* v. *Kansas City Stockyards Co. of Me.*, 484 S.W.2d 216, 221-22 (1972) (en banc); *Wilmoth* v. *Chicago, Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972); *Leake* v. *Burlington N. R.R.*, 892 S.W.2d 359, 365 (Mo. Ct. App. 1995); *Snyder* v. *Chicago, Rock Island & Pac. R.R.*, 521 S.W.2d 161, 165 (Mo. Ct. App. 1973).

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[1] MAI 24.01 requires that the jury be instructed as follows:

> Your verdict must be for plaintiff if you believe:
>
> First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and
>
> Second, [with respect to such conditions for work,] defendant either failed to provide: reasonably safe conditions for work, or reasonably safe appliances, or reasonably safe methods of work, or reasonably adequate help, and
>
> Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent, and
>
> Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].

By contrast, the Missouri Approved Instructions impose upon FELA defendants the traditional, but heavier, burden of proving that the plaintiff's contributory negligence was a *proximate* cause of his damages. The plaintiff's own negligence must have "*directly* contributed to cause his injury." MAI 32.07(B) (emphasis added) (Pet. App. 36a),[2] which the Missouri courts interpret as requiring a showing of proximate cause. See *Leake*, 892 S.W.2d at 365; *Snyder*, 521 S.W.2d at 165; *Fish* v. *Chicago Rock Island & Pac. Ry.*, 172 S.W. 340, 346 (Mo. 1914).

B. Factual Background

Respondent Sorrell was employed as a trackman by Norfolk Southern. Trial Transcript ("Tr.") 393. As such, he was a "general laborer," and performed various jobs related to track maintenance. *Id.* at 393-94. On November 1, 1999, he drove a dump truck loaded with asphalt that would be used to repair rail crossings near Kendallville, Indiana. *Id.* at 405, 409-10. He unloaded some of the asphalt at the first assigned crossing, *id.* at 410, and was on a gravel road headed for the next crossing when, according to Sorrell, another vehicle approached him, *id.* at 412. The approaching vehicle was another Norfolk Southern truck, driven by Norfolk Southern employee Keith Woodin. *Id.* at 418. Sorrell testified that he slowed down, and pulled far to the right because he did not believe the two trucks could pass one another. *Id.* at 413-14. Just as the trucks attempted to pass each other, he testified, his front tire dropped into a four-foot ditch, and the truck tipped over onto its side. *Id.* at 414-15. Sorrell claims that, as

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[2] MAI 32.07(B) requires that the jury be instructed as follows:

> You must find plaintiff contributorily negligent if you believe:
>
> First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and
>
> Second, plaintiff was thereby negligent, and
>
> Third, such negligence of plaintiff directly contributed to cause his injury.

a result of the accident, he suffered various "problems with his neck and back, right wrist and right shoulder." *Id.* at 192.

Woodin provided a different account of the accident. He testified that when he saw Sorrell approaching, he pulled his truck off the road, and was "basically stopped." Tr. at 239. Furthermore, he testified, Sorrell pulled his truck off the road when the two trucks were still 400-500 feet apart, and that was when Sorrell's wheel fell into the roadside ditch. *Id.* at 240. When he saw that happen, Woodin drove to Sorrell, in order to assist him. *Id.* at 241. At about the time that Woodin's truck reached the site where Sorrell's truck had fallen into the ditch, Woodin testified, Sorrell's truck rolled over. *Id.* at 242.

C. Proceedings Below

Sorrell brought suit under FELA, alleging that Norfolk Southern failed to provide him "a reasonably safe place to work," "reasonably safe methods for work," "reasonably safe conditions for work," and "reasonably safe equipment, tools and appliances for work." First Am. Pet. 2 (L.F. 9).[3] He sought damages stemming from various claimed physical injuries, as well as medical expenses, lost wages, and pain and suffering. *Id.*[4] The case was tried to a jury and Norfolk Southern argued, among other things, that Sorrell was contributorily negligent in the manner in which he drove his own truck. See, *e.g.*, Tr. 666-67; see generally *id.* at 659-66.

Norfolk Southern asked the court to instruct the jury that the causation standard for Sorrell's own contributory negligence is identical to the causation standard for Norfolk Southern's negligence. Tr. 574-75 (Pet. App. 27a-28a). It

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[3] "LF" citations are to the "Legal File" submitted to the Missouri Court of Appeals, which contains excerpts of the trial record.

[4] Sorrell also brought a second cause of action related to an injury that he purportedly suffered while using a tamping tool. First Am. Pet. 3 (L.F. 10). The jury awarded no damages on that claim, and it is not before this Court. *See* Verdict (Pet. App. 25a); Judgment (Pet. App. 22a-23a).

argued that FELA employs a pure comparative fault system, which requires that the same standards of causation apply to the plaintiff's and the defendant's negligence. *Id.* at 575 (Pet. App. 28a-29a). The judge rejected this request because the Missouri Supreme Court's Approved Instructions impose different standards of causation for different parties' negligence—proximate causation for contributory negligence, but less direct cause for negligence. *Id.* at 576 (Pet. App. 29a). The jury returned a verdict against Norfolk Southern in the amount of $1.5 million. In accordance with the jury instructions, the verdict form did not reflect whether the jury had determined that Sorrell was contributorily negligent nor, if so, the extent to which the jury may have reduced plaintiff's damages. See Verdict B (Pet. App. 26a). Norfolk Southern's motion for a new trial was denied. L.F. 189.

On appeal, the Missouri Court of Appeals affirmed solely on the ground that the binding MAI require divergent causation instructions. Pet. App. 7a. Norfolk Southern moved the Missouri Court of Appeals to rehear the case or to transfer it to the Missouri Supreme Court. Both motions were denied. *Id.* at 31a-32a. Norfolk Southern then filed an Application for Transfer with the Missouri Supreme Court, which was denied. *Id.* at 31a.

SUMMARY OF ARGUMENT

Missouri's rule that a jury should be instructed to apply different causation standards to railroad negligence and to employee contributory negligence is an untenable interpretation of FELA. Nothing in the statutory language suggests that result, and in FELA Congress is presumed to have adopted the common law rule absent an explicit departure therefrom. The well-established common-law rule in 1908 (and in admiralty and emerging comparative negligence schemes of the time) was that defendant negligence and plaintiff contributory negligence were measured by the same standard: proximate cause. In enacting FELA in 1908, Congress explicitly abro-

gated common law rules forbidding imputation of the negligence of a fellow servant to the employer, making the employee's contributory negligence an absolute defense to liability, denying recovery for wrongful death, and allowing contractual limitations on liability, and in 1939 it abrogated the defense of assumption of the risk, but Congress has never altered the common law rule of equivalent causation standards. Nor has the common law evolved away from the rule of equivalence; the same causation standards of proximate cause continue today to apply to defendant negligence and contributory negligence in both traditional and comparative negligence jurisdictions and in admiralty.

Not only is there no warrant in the text or in the historical or evolving common law to adopt a different rule for FELA, but the Missouri rule of divergent causation standards is also inconsistent with the operation of the FELA comparative negligence provisions. Congress directed that contributory negligence shall not bar a recovery, but that the damages shall be diminished by the jury "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. This Court has interpreted that provision to require a jury to determine the total "causal negligence," and divide damages according to the relative share of the total negligence attributable to the railroad and to the employee respectively. Under FELA, damages are apportioned according to relative fault, not relative causal contribution. By imposing a higher causation standard in order for a jury to find contributory negligence, the Missouri rule impermissibly makes the division of damages turn on relative causation rather than relative fault, thus thwarting the statutory purpose to make "each party responsible for his own negligence, and require[] each to bear the burden thereof." H.R. Rep. No. 60-1386, at 1. No comparative negligence scheme adopts the rule that Missouri has imported into FELA.

Missouri's rule of divergent causation standards is predicated on the claim that, in *Rogers* v. *Missouri Pacific Rail-*

way, 352 U.S. 500 (1957), this Court held that FELA abrogated the common law rule of proximate cause, and makes any defendant liable so long as its negligence is the "slightest" cause of injury. That is a flat misreading of *Rogers*. This Court repeatedly has held, from its earliest interpretations of the Act, that the federal standard for railroad negligence under FELA embodies proximate cause. Section 1's requirement that a railroad is liable in damages if the injury "result[ed] in whole or in part" from its negligence, 45 U.S.C. § 51, is an elaboration of the common law rule of proximate cause, not an abrogation of it. At the time of FELA's enactment, numerous common-law courts used that very formulation to clarify that proximate causation could be found even if there were multiple causes of injury. It would have been more than slightly odd if Congress had explicitly abrogated various common law defenses favorable to the employer in the statute, but then only implicitly abrogated a doctrine as central to negligence actions as proximate cause. Indeed, this Court, after cataloging the various abrogations of the common law in the 1908 Act and the 1939 Amendments, made a point of observing that a jury must still decide "whether the carrier was negligent and whether that negligence was the *proximate cause* of the injury." *Tiller*, 318 U.S. at 62-67 (emphasis added).

Rogers is not to the contrary. *Rogers* simply rejected a particular state common-law conception of "proximate cause" that limited railroad liability to circumstances where its negligence was the "sole, efficient, producing cause of injury," 352 U.S. at 506. *Rogers* held that, if there was evidence from which the jury could find that both the railroad's negligence and the employee's negligence were proximate causes of injury, the question of railroad liability must go to the jury even if it played the slightest part in the injury—*i.e.*, if its causal contribution was slight relative to the employee's negligence. Common law courts frequently employed similar analysis to issues of multiple proximate causes. *Rogers* did not silently

overrule at least 20 of this Court's precedents establishing a federal rule of proximate cause under FELA, some of them very recent vintage; on the contrary, it relied on this Court's contributory proximate cause decisions in deriving its test to determine when a case must be submitted to a jury. Furthermore, the petitioner in *Rogers* did not ask the Court to overrule those cases, but instead affirmatively asked it to apply the rule of proximate cause. Nor did any dissenting Justice read the opinion as establishing a new and radical rule that a defendant's liability turns on whether its negligent acts are the "slightest cause" of injury. Such a diluted causation approach is irreconcilable with sound policy; this Court in recent decisions in other contexts has emphasized the justness of the proximate cause rule, which ensures that parties are not held responsible for injuries that are only tenuously and distantly related to their negligence. *Rogers* did not adopt an unjust rule of causation for railroad negligence, much less create an anomalous comparative negligence scheme where a jury is instructed to apply different causation standards to different parties' negligence.

The jury instructions in this case did not properly instruct the jury with regard to contributory negligence, because they allowed recovery to the plaintiff under a causation standard for Norfolk Southern's negligence that was more generous than the standard applied to respondent's contributory negligence. Accordingly, the judgment below should be reversed and the case remanded for a new trial.

ARGUMENT

I. UNDER FELA, THE CAUSATION STANDARDS FOR NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE ARE THE SAME.

In interpreting a federal statute, "[w]e begin with the text." *United States* v. *Wells*, 519 U.S. 482, 490 (1997); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989). Section 1 of FELA makes "[e]very common carrier by rail-

road ... liable in damages" for the injury or death of an employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. If the plaintiff meets that burden of proof, section 3 provides a limited defense of contributory negligence: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." *Id.* § 53.

Section 3 is silent as to the standard of causation that applies to contributory negligence defenses. In interpreting FELA, this Court looks to common-law principles except where Congress explicitly departed from those rules. *Urie*, 337 U.S. at 182 ("the Federal Employers' Liability Act is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms"); *Gottshall*, 512 U.S. at 541-42 ("because 'FELA jurisprudence gleans guidance from common-law developments,' we must consider the common law's treatment of the right of recovery asserted by respondents"). And, because FELA *did* expressly abrogate the common law in certain limited respects, it is presumed *not* to have done so with regard to the common-law rules that it did not explicitly modify. *Id.* at 544 ("Only to the extent of these explicit statutory alterations is FELA 'an avowed departure from the rules of the common law'"); *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337-38 (1988) ("Congress did not deal at all with the equally well-established doctrine barring the recovery of prejudgment interest, and we are unpersuaded that Congress intended to abrogate that doctrine *sub silentio*"). So, although prevailing common-law principles are not dispositive, "unless they are expressly rejected in the text of the statute, they are entitled to great weight in [this Court's] analysis." *Gottshall*, 512 U.S. at 544. This comports with the general presumption that Congress is presumed not to abrogate common-law principles unless a statute "'speak[s] directly' to the question ad-

dressed by the common law." *United States* v. *Texas*, 507 U.S. 529, 534 (1993).[5]

A. The Common Law At The Time FELA Was Enacted Employed The Same Proximate-Cause Standard For Negligence And For Contributory Negligence.

The common-law causation rule in effect at the time of FELA's enactment (which is the same rule that governs today) was that the standards for defendant negligence and plaintiff contributory negligence were one and the same—to be actionable, the negligent act must be a proximate cause of the damages. This was the rule that governed a plaintiff's efforts to make out a claim for negligence. It likewise was the rule in each of the different contributory-negligence systems that existed at common law during that period.

At the time of FELA's enactment in 1908, it was the well-recognized and unbroken common-law rule that in order to recover damages, a plaintiff must prove that the defendant's negligence proximately caused his injury. William B. Hale, *Handbook on the Law of Torts* § 227, at 449 (1896). Writing for this Court shortly after FELA's enactment, Justice Holmes recognized this foundational principle. See *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss."); see also, *e.g.*, 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898)

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[5] *See also Texas*, 507 U.S. at 534 ("'[s]tatutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident'") (alteration and omission in original); *Astoria Fed. Sav. & Loan* v. *Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles.").

("The breach of duty, upon which an action is brought, must be not only the cause, but the *proximate cause*, of the damage to the plaintiff.") (emphasis in original); Charles Fisk Beach, Jr., *A Treatise on the Law of Contributory Negligence or Negligence as a Defense* § 305, at 446 (3d ed. 1899) (proximate cause is "too firmly founded on reason and justice to be lost sight of in any discussion of liability for negligence"); *Associated Gen. Contractors of Calif., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 531-33 (1983) (discussing the common law's settled reliance on a proximate cause standard at the end of the nineteenth century).

The same causation standard likewise applied to contributory negligence. The treatise relied upon by the House Committee that sponsored FELA in 1908 declared it a "settled rule of law" that a plaintiff's *contributory* negligence "must contribute as a proximate cause, and not as a remote cause or mere condition." Beach, *supra*, § 24, at 32; *id.* § 33 at 42[6]; see *Grand Trunk R.R.* v. *Ives*, 144 U.S. 408, 429 (1892) ("[A]n action for [negligence] cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured."). The First Restatement of Torts likewise stated that

> [t]he rules which determine the causal relation between the actor's negligent conduct and the harm resulting to him therefrom, which is necessary to make his conduct contributory negligence preventing him from recovery, *are the same* as those ... determining the causal relation between the actor's negligent conduct and the harm to another which is necessary to make him liable therefor.

Restatement of Torts § 462, at 1223 (1934) (emphasis added); *accord id.* § 465 cmt. a; 1 Shearman & Redfield, *supra*, § 94,

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[6] The House Report for the 1908 statute relied upon Shearman and Redfield's and Beach's treatises for an understanding of common-law rules—and in particular, comparative-negligence regimes—in the course of discussing FELA section 3. H.R. Rep. No. 60-1386, at 5.

at 143-44 ("[t]he plaintiff's fault does not affect his right of action, unless it *proximately* contributed to his injury. It must be a proximate cause, *in the same sense* in which the defendant's negligence must have been a proximate cause in order to give any right of action" (footnote omitted) (second emphasis added)).[7]

Importantly, proximate cause was the rule in each of the contributory and comparative negligence regimes that existed at the time FELA was enacted. During the late nineteenth and early twentieth centuries, the common law began to shift away from the traditional rule of contributory negligence, which barred a contributorily negligent plaintiff from all recovery, to various comparative negligence regimes, which merely limited (or "mitigated") the plaintiff's damages. *Tiller*, 318 U.S. at 62; *Seaboard Air Line Ry.*, 237 U.S. at 500; see generally William L. Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 477-82 (1953); E.A. Turk, *Comparative Negligence on the March—Part II*, 28 Chi.-Kent L. Rev. 304, 304-33 (1950). Congress was fully aware of these emerging comparative-negligence systems when it enacted FELA. See H.R. Rep. No. 60-1386, at 5. And, just as proximate cause was the rule under the old contributory negligence system, it likewise was the recognized standard under the

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[7] *Accord* Thomas M. Cooley, *A Treatise on the Law of Torts* §347, at 704-05 (John Lewis students' ed. 1907) ("The negligence that will defeat a recovery must be such as proximately contributed to the injury. The remote cause will no more be noticed as a ground of defense than as a ground of recovery." (footnote omitted)); 1 Shearman & Redfield, *supra*, § 61, at 153 (Robert G. Street ed., 6th ed. 1913) ("To constitute contributory negligence, exempting the defendant from liability, it is as necessary that the plaintiff's negligence should be a proximate and not a remote cause, efficiently contributing to the injury or damage, as it is that defendant's primary negligence ... should be a proximate and efficient cause."); 1 Edgar B. Kinkead, *Commentaries on the Law of Torts* § 250, at 533 (1903) ("The doctrine[s] of contributory negligence and proximate cause are so closely allied as to be dependent on each other. The true question in all cases is whether there was negligence on the part of the plaintiff contributing directly as a proximate cause of the injury.").

evolving systems of comparative negligence. Prosser, *supra*, at 481; Turk, *supra*, at 316-17, 333; Beach, *supra*, §§ 72-99, at 112-40; 1 Shearman & Redfield, *supra*, §§ 102-103, at 157-59.

Around the time of FELA's enactment, there existed three primary categories of comparative-negligence systems. First, certain States adopted a regime of pure comparative negligence.[8] This was the same rule that Congress implemented in FELA—the plaintiff's contributory negligence proportionately offset the defendant's negligence—and indeed the language of at least one State statute precisely mirrored FELA.[9] Like FELA, these statutes were silent as to the applicable causation standard, so courts interpreted them as incorporating the traditional rule of proximate cause, both as to negligence and contributory negligence:

> There is an underlying principle applicable to all cases of negligence, ... that holds good in cases falling within the provisions of this statute as in others. That is that the negligence proved against the defendant must, in order to justify recovery, be the direct or proximate cause of the injury, directly or proximately contributing to its result. The courts, in giving this statute in charge, should instruct the juries that, in making the apportionment between the plaintiff's and defendant's negligence, they should not take into consideration any negligence *of ei-*

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[8] *E.g.*, Fla. Stat. § 2345 (1892) ("No person shall recover damages from a railroad company for injury to himself or his property, when the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury trying the case in proportion to the amount of default attributable to him.").

[9] *Compare* 1910 Miss. Laws 125 ("contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured"), *with* 45 U.S.C. § 53 ("contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee").

> *ther of the parties* that did not directly or proximately contribute to the bringing about of the injury complained of.

Florida Cent. & Pac. R.R. v. *Williams*, 20 So. 558, 563 (Fla. 1896) (emphasis added); *accord Stringfellow* v. *Atlantic Coast Line R.R.*, 290 U.S. 322, 325-26 (1933) (applying proximate cause under a Florida statute).

Second, a group of States adopted the "slight-gross" rule, by which a negligent plaintiff could recover if his "negligence is comparatively slight, and that of the defendant gross." *Galena & Chi. Union R.R.* v. *Jacobs*, 20 Ill. 478, 1858 WL 6123, at *17 (1858); *id.* ("wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action").[10] Under this system, too, proximate causation was the measure of the both parties' negligence. See, *e.g.*, *Sawyer* v. *Sauer*, 10 Kan. 466, 1872 WL 722, at *4 (1872) ("In this state we recognize the different degrees of negligence.... The law does not regard the remote causes of an injury. It is enough to determine the proximate causes."); *Stratton* v. *Central City Horse Ry.*, 95 Ill. 25, 1880 WL 10004 (1880).

Third, some States implemented the "less than" approach, under which a plaintiff could recover only if his fault was less than the defendant's (or, in certain States, less than or equal to the defendant's fault, see Prosser, *supra*, at 489-91). *E.g.*,

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[10] *E.g.*, 1908 Ohio Laws 25; 1907 N.D. Laws 333; *Stucke* v. *Milwaukee & Miss. R.R.*, 9 Wis. 202, 1859 WL 2832 (1859); *compare Sawyer* v. *Sauer*, 10 Kan. 466, 1872 WL 722 (1872) (adopting a slight-gross regime), *with Atchison, Topeka & Santa Fe. Ry.* v. *Henry*, 45 P. 576 (Kan. 1896) (repudiating it); *cf. also Cicero & Proviso Street Ry.* v. *Meixner*, 43 N.E. 823 (Ill. 1895) (repudiating the Illinois slight-gross system). This was the system that Congress originally chose in the 1906 precursor of FELA that this Court struck down as exceeding Congress's powers under the Commerce Clause. Act of June 11, 1906, ch. 3073, § 2, 34 Stat. 232, 232; *Howard* v. *Illinois Cent. R.R. (Employers' Liab. Cases)*, 207 U.S. 463 (1908).

1907 S.D. Sess. Laws 455; *Southern Ry.* v. *Watson*, 30 S.E. 818 (Ga. 1898). In those States, too, proximate cause was a bedrock requirement. See, *e.g.*, Richard V. Campbell, *Wisconsin's Comparative Negligence Law*, 7 Wis. L. Rev. 222, 231 (1932) (under Wisconsin's "less than" regime, "[n]o change has been made [with respect to traditional causation requirements] by the new law. Only negligence of the respective parties which operates as a legal or proximate cause of the injuries in issue will be considered in determining the proportions of fault."); Turk, *supra*, at 333 (summarizing the Georgia rule, including the requirement of proximate cause).

Proximate cause also was the rule at admiralty. FELA "was intended to 'brin[g] our jurisprudence up to the liberal interpretations that ... now prevail in the admiralty courts of the United States.'" *Ayers*, 538 U.S. at 163 (quoting 42 Cong. Rec. 4536 (1908) (alteration and emphasis in original) (remarks of Sen. Dolliver)). Around the time of FELA's enactment, this Court repeatedly recognized proximate cause as the rule in admiralty, which provided for division of damages when both parties were found at fault. See, *e.g.*, *The Manitoba*, 122 U.S. 97, 105, 111 (1887); *The G.R. Booth*, 171 U.S. 450, 452-53 (1898) ("the question [is] ... whether it is the explosion, or a peril of the sea, that is to be considered as the proximate cause of the damage, according to the familiar maxim *causa proxima non remota spectatur*."); *id.* at 460-61; *The Francis Wright*, 105 U.S. 381, 387 (1881) ("If the unseaworthiness was not the proximate cause of the loss, it is not contended the vessel can be charged with the damages."); see also *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U.S. 394, 404 (1935); *Jahn* v. *The Folmina*, 212 U.S. 354, 362 (1909). Cf. *The Max Morris* v. *Curry*, 137 U.S. 1, 15 (1890) (extending the divided damages rule to personal injury cases). Thus, both traditional contributory negligence and emerging comparative negligence schemes applied an equivalent standard of proximate cause to defendant and plaintiff negligence alike.

Because proximate cause was so firmly established at common law, and was not expressly altered by Congress in FELA, this Court and others have applied that rule in FELA cases of multiple causation and contributory negligence just as in the primary analysis of the defendant's negligence. See, *e.g.*, *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435-36 (1949); *Tiller*, 318 U.S. at 67; *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 120 (1913) (affirming a jury instruction that "'[c]ontributory negligence is the negligent act of a plaintiff which, concurring and cooperating with the negligent act of a defendant, is the proximate cause of the injury'"); Daunis McBride, *Richey's Federal Employers' Liability, Safety Appliance, and Hours of Service Acts* § 66, at 156 (2d ed. 1916) ("In order to diminish a recovery the contributory negligence of the employee must have been the proximate cause of his injury."); see also *Ridge* v. *Norfolk S. R.R.*, 83 S.E. 762, 770 (N.C. 1914) ("[w]here there are two causes co-operating to produce an injury, one of which is attributable to defendant's negligence, the latter becomes liable, if together they are the proximate cause of the injury, or if defendant's negligence is such proximate cause").[11]

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[11] Some courts and commentators erroneously reasoned that the contributory negligence of the plaintiff, if sufficiently causally related to the harm suffered to serve as a bar to recovery, would displace the causal effect of the defendant's negligence, and truly become the sole proximate cause. *See, e.g.*, *Lea* v. *Southern Pub. Utils. Co.*, 97 S.E. 492, 493 (N.C. 1918) ("It is well settled that when the plaintiff and defendant are negligent, and the negligence of both concur and continue to the time of the injury, the negligence of the defendant is, in a legal sense, not the proximate cause of the injury, and plaintiff cannot recover."). However, more thoughtful courts and commentators recognized that concurring proximate causes were characteristic of actions for contributory negligence. *See, e.g.*, *Spokane & Inland Empire R.R.* v. *Campbell*, 241 U.S. 497, 510 (1916) (rejecting the need to identify a "sole efficient cause" and recognizing the existence of "concurring proximate causes" in the context of a contributory negligence analysis); Beach, *supra*, § 26, at 35; 1 Seymour D. Thompson, *Commentaries on the Law of Negligence In All Relations*, § 217, at 212 (2d ed. 1901).

B. Modern Contributory And Comparative Negligence Schemes Apply The Same Causation Standards To Defendant And Plaintiff Negligence.

Not only was the rule of equivalence well settled at the time of FELA's enactment, but respondent cannot claim that the common law has evolved to a different rule. *Ayers*, 538 U.S. at 145 ("The Court's duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law." (internal quotation marks omitted)). The same rule of equivalence applies today in traditional contributory negligence systems, in modern comparative negligence schemes, in admiralty, and even in contribution law governing the apportionment of damages among tortfeasors.

The Second Restatement of Torts, which elaborates the law of contributory negligence, explains that "[t]he rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him are the same as those determining the causal relation between the defendant's negligent conduct and resulting harm to others." *Restatement (Second) of Torts* § 465(2) (1965).[12]

Similarly, the Third Restatement of Torts, which sets forth the modern law of comparative negligence, provides that "[p]laintiff's negligence is defined by the applicable standard for a defendant's negligence." *Restatement (Third) of Torts: Apportionment of Liability* § 3 (2000); *accord* 1 Dan B. Dobbs, *The Law of Torts*, § 199, at 497 (2001) ("The same rules of proximate cause that apply on the issue of negligence

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[12] *Accord Restatement (Second) of Torts* § 465 cmt. b:

> The rules which determine whether the causal relation between the plaintiff's conduct and his harm is such as to make the law regard it as a legally contributing cause and, therefore, ... sufficient to make his failure to exercise reasonable care for his own protection contributory negligence barring him from recovery against a negligent defendant, are the same as those which determine whether the conduct of the actor as defendant is sufficient to make him responsible and, therefore, liable for a harm to another.

also apply on the issue of contributory negligence." (footnote omitted)).

Modern admiralty law continues to follow the traditional rule of equivalent standards of proximate causation, as both courts and commentators recognize. *E.g.*, *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996) (reaffirming proximate cause); 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-3, at 188-93 (4th ed. 2004); see also *id.* § 5-4, at 194 ("According to the rule of comparative negligence, the degree of fault of the plaintiff which proximately caused his injury reduces the total damage award by that percentage.").

Just as the division of responsibility between plaintiff and defendant is governed by equivalent rules of proximate cause, this same standard obtains in the law of contribution when fault is apportioned among multiple defendants. See 3 Fowler V. Harper, Fleming James & Oscar S. Gray, *The Law of Torts* § 10.2, at 46 (2d ed. 1986) (contribution requires that each defendant "'is legally liable for a part or all of the same damages'"); *e.g.*, *Seaboard Shipping Corp.* v. *Inland Waterways Corp. (In re Seaboard Shipping Corp.)*, 449 F.2d 132, 138 (2d Cir. 1971); *Southern Ry.* v. *Foote Mineral Co.*, 384 F.2d 224, 226, 228 (6th Cir. 1967). This principle is vividly illustrated by the Third Restatement of Torts, which describes different contribution systems (or "tracks") that jurisdictions adopt for the apportionment of indivisible harms, but declares the same causation standard for each. See *Restatement (Third) of Torts: Apportionment of Liability* § A18, at 160 & cmt. b; *id.* § B18, at 168 & cmt. c; *id.* § C18, at 186 & cmt. c; *id.* § D18, at 220 & cmt. e; *id.* § E18, at 241 & cmt. f. Likewise, the Restatement requires the same causation standard for divisible harms. See *id.* § 26 cmts. k, m, rptrs.' note to cmt. m, at 337 ("Ultimately, however, no party can be held liable without a finding of legal culpability and legal cause."); see also Uniform Comparative Fault Act § 1(b) & cmt. (1977) (amended 1979) ("For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have

had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause.").

It should come as no surprise that in all these systems of law the same causation standard—proximate cause—applies to both defendant negligence and plaintiff contributory negligence. Then, as now, causation was measured by a single metric for all parties, and operated as a "gatekeeping concept[]" for both negligence and contributory negligence—it "exclud[es] some negligence from consideration when it is not causal in fact and when it is too remote." 1 Dobbs, *supra*, § 202, at 509. As Bigelow explained around the time of FELA's enactment, "[w]rongful acts or omissions cannot be set off against each other, so as to make the one excuse the other, unless they stand respectively in the situation of true causes to the damage[s]." Melville Madison Bigelow, *The Law of Torts* § 14, at 392 (7th ed. 1901). Once the causation hurdle was cleared, causation was not measured as part of the comparative fault analysis. "It is a basic intention in all loss apportionment statutes, once the fact of concurrent faults is found, to exclude the artificial rules of legal 'causation' and attack the problem of loss directly in the mutual faults from which an injury proceeds." Francis S. Philbrick, *Loss Apportionment of Negligence Cases Part II*, 99 U. Pa. L. Rev. 766, 806 (1951) (emphasis omitted).[13] So in *Union Oil Co.* v. *The San Jacinto*, for instance, this Court held that the determination of causation is logically antecedent to questions of apportionment, 409 U.S. 140, 141 (1972), and because there was no proximate causation, there could be no apportionment of damages, *id.* at 146. To adopt wholly different threshold causation standards, as the Missouri Supreme Court has done, is

[13] *See* 1 Dobbs, *supra*, § 201, at 504 ("[C]ourts in negligence cases ordinarily compare fault, not causation. Causation usually remains an all or nothing issue. Once it is established, the causal fault of the plaintiff is compared with the causal fault of the defendant."); *see also id.* § 202, at 509 ("this does not mean that causation itself is somehow put on the scales and weighed").

to turn causation into a point of relative comparison in just the way the common law never has and does not now permit.

C. Divergent Causation Standards Are Inconsistent With The FELA System Of Comparative Negligence, Which Apportions Damages Based On Relative Fault (Not Relative Causation).

Employing divergent standards of causation would conflict with Congress's goal in enacting the comparative-negligence regime of section 3. The purpose of the statute is to ensure that both the employee and the railroad "bear the burden" of their own negligence. H.R. Rep. No. 60-1386, at 1. Thus, "'[t]he design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it.'" *Illinois Cent. R.R.* v. *Skaggs*, 240 U.S. 66, 73 (1916) (approving a jury instruction); *id.* ("'the plaintiff would be responsible himself to the extent to which he was to blame'"); see also *Tiller*, 318 U.S. at 65 ("'comparative negligence ... permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned'").[14] But,

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[14] *See also* H.R. Rep. No. 59-2335, at 4 (1906) ("Each party shall pay the penalty of his own negligent act."); *id* at 4-5 ("What can be more fair than that each party shall suffer the consequences of his own carelessness?"); 42 Cong. Rec. at 4434. The clear purpose of the FELA was to make both parties responsible for their own negligence. *Id.* (statement of Rep. Clayton) (FELA "makes each party responsible for his own negligence, and requires each to bear the burden thereof"); *id.* at 4427 (statement of Rep. Sterling) (FELA "provides that the responsibility of the negligence of the employer and of the employee shall rest upon each. It requires the jury to reduce the damages in proportion to the negligence committed by the injured employee."). Indeed, when Congress amended FELA in 1939 to abolish the defense of assumption of the risk, Ch. 685, § 4, 53 Stat. 1404, 1404 (1939) (amending 45 U.S.C. § 54), its purpose was to "[re]establish the principle of comparative negligence, which per-

whereas Congress intended the negligence of employers and employees to be weighed by the same metric, the Missouri rule would place a thumb on the scale that has no textual warrant. See *Ganotis* v. *New York Cent. R.R.*, 342 F.2d 767, 768-69 (6th Cir. 1965) ("We do not believe that the Act also intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and proximate cause when considered in connection with the employee's contributory negligence. If it had so intended, express words to that effect could easily have been used.").

The language of the statute makes plain Congress's intent that relative fault, not relative causal contribution, should determine the apportionment of damages. Section 3 provides that "the damages shall be diminished by the jury *in proportion to the amount of negligence* attributable to such employee." 45 U.S.C. § 53 (emphasis added). Ninety years of this Court's precedents confirm that the diminution of a plaintiff's damages under FELA depends upon an apples-to-apples comparison of the plaintiff's and the defendant's negligence. Under section 3, the jury determines the extent to which each party is to blame, evaluating both parties' negligence on the same scale, and reduces the plaintiff's damages accordingly:

> "if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame, and the plaintiff would be responsible himself to the extent to which he was to blame."

Skaggs, 240 U.S. at 73; *accord Lindsay*, 233 U.S. at 49 ("the damages are to be diminished in the proportion which [the plaintiff's] negligence bears to the combined negligence of himself and the carrier, —in other words, the carrier is to be exonerated from a proportional part of the damages corre-

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mits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned." S. Rep. No. 76-661, at 4 (1939).

sponding to the amount of negligence attributable to the employee"); *Earnest*, 229 U.S. at 121-22.

Skaggs, and this Court's other precedents like it, in no way suggest that the causation standards for negligence and contributory negligence may differ. On the contrary, this Court has indicated that the trigger for an analysis of comparative fault is that both the plaintiff and the defendant are a legal cause of the damages:

> where the *causal negligence* is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery *a proportional part of the damages corresponding to the employee's contribution to the total negligence.*

Seaboard, 237 U.S. at 501 (emphases added). The appropriate point of comparison is the parties' relative "blame"—i.e., their fault. See also 42 Cong. Rec. at 4427 (statement of Rep. Sterling) (FELA "provides that the responsibility of the negligence of the employer and of the employee shall rest upon each").

Thus, under FELA, the jury must determine the total "causal negligence" of both railroad and employee; apportion that total between the railroad and employee according to relative fault; and award "a proportional part of the damages corresponding to the employee's contribution to the total negligence." *Seaboard*, 237 U.S. at 501; *Earnest*, 229 U.S. at 122; see also *Carter*, 338 U.S. at 435-36. The statutory scheme of apportionment of damages depends upon the same standard of causation applying to both railroad and employee negligence.

In this case, Norfolk Southern asked that the jury be instructed with the same causation standard for contributory

negligence that the court instructed as to defendant negligence. JA 9-10. The trial court expressly declined to do so, JA 9-10, and instead (as the MAI require) gave instructions that required the jury to apply a more stringent standard to the issue of whether Norfolk Sourthern's negligence caused injury than to whether Sorrell's negligence did so. The Missouri requirement, and the decision below upholding it, are contrary to the precedents of this Court, do violence to the language of the FELA, and destroy the symmetry the Act envisions by allowing the jury to apportion damages between defendants and employees on an apples-to-oranges basis. Accordingly, the judgment should be reversed and the case remanded for a new trial.

II. DIVERGENT CAUSATION STANDARDS CANNOT BE JUSTIFIED ON THE GROUNDS THAT SECTION 1 ABROGATED THE PROXIMATE CAUSE RULE FOR RAILROAD NEGLIGENCE.

Despite the clarity of the statutory scheme, the Missouri Supreme Court has promulgated divergent causation instructions for railroad and employee negligence. See MAI 24.01 (Pet. App. 35a-36a), 32.07(B) (Pet. App. 36a). Mandatory state jury instructions cannot deprive parties of their rights under federal law. *St. Louis Sw. Ry.* v. *Dickerson*, 470 U.S. 409, 411 (1985). The Comments to the MAI, however, purport to justify a divergence based on Congress's supposed abrogation of the rule of proximate cause as to railroad negligence alone in section 1 of the Act:

> In an F.E.L.A. case, common law negligence rules are controlling *except* that these rules have been modified by F.E.L.A. Because of the "in whole or in part" language of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the *slightest* cause of the employee's injury. *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

MAI 24.01, comm. cmt., at 373 (6th ed. 2002) (noting that this rule departs from the "traditional negligence case," where "it is mandatory for the plaintiff to include the word 'direct' or 'directly' in his instruction because of the proximate (direct) cause requirements"); see MAI 32.07(B) (Pet. App. 36a) (requiring proof for FELA contributory negligence instruction that the "negligence of [the] plaintiff directly contributed to cause his injury"). The MAI and comments reflect earlier Missouri Supreme Court decisions so interpreting *Rogers*. See *Ricketts*, 484 S.W.2d at 221-22; *Beard* v. *Railway Express Agency, Inc.*, 323 S.W.2d 732, 741-42 (Mo. 1959); *supra* at 4; Opp. 5-6 (defending MAI on the basis of *Rogers*).

The MAI are premised on a wholesale misreading of federal law. This Court repeatedly has held, from the inception of the Act, that the federal standard for railroad negligence under FELA is proximate cause. Section 1's requirement that a railroad is liable in damages if the injury "result[ed] in whole or in part" from its negligence, 45 U.S.C. § 51, is an elaboration of the common-law rule of proximate cause, not an abrogation of it. At the time of FELA's enactment, numerous common-law courts employed that very formulation in clarifying that proximate causation could be found even if there were multiple causes of injury. Finally, *Rogers* v. *Missouri Pacific Railway* did not *sub silentio* overrule decades of this Court's precedents establishing a federal rule of proximate cause under FELA; it relied upon them. 352 U.S. at 506 n.11, 507 n.13. *Rogers* simply rejected a particular state common-law conception of "proximate cause" that limited railroad liability to circumstances where its negligence was the "sole, efficient, producing cause of injury," *id.* at 506.

A. This Court Has Long Held, In Keeping With FELA's Plain Language, That Plaintiffs Must Prove That Railroad Negligence Proximately Caused Their Injury.

1. Section 1 of the Act renders railroads liable in damages for an injury to an employee engaged in interstate commerce

"resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. This Court has held that this language established the rule of proximate cause: The plaintiff must prove that "negligence was *the proximate cause in whole or in part*" of the employee's injury. *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944) (emphasis added). Accordingly, under FELA,

> "to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Brady v. *Southern Ry.*, 320 U.S. 476, 483 (1943) (quoting *Milwaukee & Saint Paul Ry.* v. *Kellogg*, 94 U.S. 469, 475 (1876)). As a leading contemporary scholar of the Act summarized the law: "In order for the railroad company to be liable, its negligence must have been the proximate cause of the injury," and "[p]roximate cause is still to be determined according to the general existing rule on that subject." McBride, *supra*, § 55, at 138, 139.

Likewise, in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), this Court reviewed and reconciled its precedents applying proximate cause, and set forth the following elaboration on the rule of proximate cause:

> The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the acci-

> dent, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

Id. at 243.[15] Indeed, this Court has treated the issue as simply obvious: "It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage." *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913).

In at least 20 cases in total, this Court has stated that the causation rule under FELA, just as at common law, is proximate cause. See also *Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926) (same); *Northwestern Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934) (same); see also *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294, 297-98 (1949); *Carter*, 338 U.S. at 435; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Urie*, 337 U.S. at 195; *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949); *Tiller*, 318 U.S. at 67; *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *New York*

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[15] *Davis* was brought under the SAA, which is governed by the same rule of causation as other FELA claims of negligence. *See Carter*, 338 U.S. at 434 (under the SAA, "the test of causal relation stated in the Employers' Liability Act is applicable"). A breach of the SAA is negligence per se, and so the plaintiff still must prove causation and damages. Relevant here, the SAA right of recovery against a railroad is limited to an "injury the proximate cause of which was a failure to comply with the requirement of the Act." *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938) (internal quotation marks omitted); *St. Louis & S.F. R.R.* v. *Conarty*, 238 U.S. 243, 249 (1915); *Lang*, 255 U.S. at 461; *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917) ("carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty").

Cent. R.R. v. *Ambrose*, 280 U.S. 486, 489 (1930); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 409-10 (1926); *Union Pac. R.R.* v. *Hadley*, 246 U.S. 330, 333 (1918); *Spokane & Inland Empire R.R.* v. *Campbell*, 241 U.S. 497, 504-05, 510 (1916); *Earnest*, 229 U.S. at 119.[16]

2. The MAI's premise that the "whole or in part" language of section 1 abrogated the rule of proximate cause is not only refuted by this Court's precedents, but also it is wrong simply as a matter of statutory construction. This language has nothing to do with remoteness or proximacy of causation. Rather, it addresses multiple causation. It means that the carrier is responsible in damages, regardless of whether the employee's injury "result[s] in whole" from the carrier's negligence, or instead "result[s] ... in part" from carrier negligence and in part from other causes:

> It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result *in whole or in part* from the negligence of any of the officers, agents, or employees of the employing carrier or by reason of any defect or insufficiency, due to its negligence, in its property or equipment. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury.

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[16] Lower courts at the time FELA was enacted interpreted the statute in the same fashion. *E.g.*, *Manson* v. *Great N. Ry.*, 155 N.W. 32, 34 (N.D. 1915) ("the negligence of the railway company or its employés must have been the proximate cause of the injury"); *Nelson* v. *Northern Pac. Ry.*, 148 P. 388, 390-91 (Mont. 1915) (the "rule recognized by the courts everywhere [is] that, in order for plaintiff to recover for personal injuries suffered by reason of a breach of duty owed to him by defendant, it is indispensably necessary that he allege facts and circumstances disclosing such breach of duty, and also establish by his evidence that it was the proximate cause of his injury").

Skaggs, 240 U.S. at 69-70 (emphasis added) (citation omitted); see also *Mobile & Ohio R.R.* v. *Campbell*, 75 So. 554, 557 (Miss. 1917) (interpreting a Mississippi statute with the same language as FELA).

Richey's treatise on FELA, published shortly after FELA's enactment, confirms that "in whole or in part" addresses multiple causation:

> Where two cases coöperate to produce an injury, one of which is attributable to the defendant's negligence, the latter becomes liable, if together they are the proximate cause of the injury, or if the defendant's negligence is the proximate cause. This must be taken to be the meaning of the words of the act declaring liability for injuries "resulting in whole or in part from the negligence," etc.

McBride, *supra*, § 55, at 140 (footnote omitted).

Were this interpretation of the statute not clear enough from its plain text and this Court's precedent, it is confirmed by the fact that courts and commentators prior to FELA's enactment commonly invoked the language of "in whole or in part" to explain multiple causation in the common law, and did so with explicit reference to rules of proximate causation:

> Not the sole proximate cause.—The plaintiff's negligence, in order to constitute a defense to the action he brings, need not, of course, be the *sole proximate cause* of the injury, for this excludes the idea of negligence on the part of the defendant, as in any legal sense material. If his negligence is the sole cause of his injury, it is not contributory negligence at all. So the Supreme Court of Iowa declares the rule to be that if the plaintiff's want of ordinary care was *in whole or in part a proximate cause* of his injury, he cannot recover.

Beach, *supra*, § 26, at 35 (emphases added); 1 Seymour D. Thompson, *Commentaries on the Law of Negligence In All*

Relations § 217, at 212 (2d ed. 1901) (same); see also *Georgia R.R. & Banking Co.* v. *Neely*, 56 Ga. 540, 1876 WL 3277, at *3 (1876) ("For the same reason the recovery is *wholly* defeated when his negligence is shown to have been the sole cause of the injury, it will be defeated *in part* when his negligence is shown to have been *part* of the cause." (emphases added)). Indeed, in the decades prior to FELA's enactment, dozens if not hundreds of courts—including at least 25 state supreme courts—used "in whole or in part" to refer to multiple causation in negligence actions. The phrase was used to clarify that an injury could have more than one proximate cause, not to lower the causation standard.[17]

3. This Court has held that, given the express abrogation of certain common-law rules in FELA, Congress is presumed not to have departed from the common law, *except* where it

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[17] *E.g.*, *Southern Ry.* v. *Howell*, 34 So. 6, 7, 10 (Ala. 1903); *Gila Valley Globe & N. Ry.* v. *Lyon*, 80 P. 337, 340 (Ariz. 1905), *aff'd*, 203 U.S. 465 (1906); *St. Louis Iron Mountain & S. Ry.* v. *Coolidge*, 83 S.W. 333, 334 (Ark. 1904); *Schneider* v. *Market Street Ry.*, 66 P. 734, 736 (Cal. 1901); *Denver & Rio Grand R.R.* v. *Peterson*, 69 P. 578, 579 (Colo. 1902); *Park* v. *O'Brien*, 23 Conn. 339, 1854 WL 818, at *5 (1854); *Jacksonville Street Ry.* v. *Chappell*, 21 Fla. 175, 1885 WL 1758, at *6 (1885); *New York Chi. & St. Louis R.R.* v. *Periguey*, 37 N.E. 976, 977 (Ind. 1894); *Rietveld* v. *Wabash R.R.*, 105 N.W. 515, 517 (Iowa 1906); *Louisville & Evansville Mail Co.* v. *Barnes' Adm'r*, 79 S.W. 261, 262 (Ky. 1904); *Guthrie* v. *Maine Cent. R.R.*, 18 A. 295, 296 (Me. 1889); *Paquin* v. *Wisconsin Cent. Ry.*, 108 N.W. 882, 883 (Minn. 1906); *Memphis & Charleston R.R.* v. *Jobe*, 10 So. 672, 672 (Miss. 1891); *Cornovski* v. *St. Louis Transit Co.*, 106 S.W. 51, 54 (Mo. 1907); *Nord* v. *Boston & Mont. Consol. Copper & Silver Mining Co.*, 75 P. 681, 684 (Mont. 1904); *Ricker* v. *Freeman*, 50 N.H. 420, 1870 WL 3123, at *6 (1870); *Pendroy* v. *Great N. Ry.*, 117 N.W. 531, 536 (N.D. 1908); *Baltimore & Ohio R.R.* v. *Kreager*, 56 N.E. 203, 205 (Ohio 1899); *Trickey* v. *Clark*, 93 P. 457, 460 (Or. 1908); *Rosevear* v. *Borough of Osceola Mills*, 32 A. 548, 560 (Pa. 1895); *Cooper* v. *Georgia, Carolina & N. Ry.*, 39 S.E. 543, 545-56 (S.C. 1901); *Mayor of Knoxville* v. *Cox*, 53 S.W. 734, 735 (Tenn. 1899); *Gulf, Colo. & Santa Fe Ry.* v. *Shieder*, 30 S.W. 902, 903 (Tex. 1895); *Barrickman* v. *Marion Oil Co.*, 32 S.E. 327, 333 (W. Va. 1898); *Bolin* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 84 N.W. 446, 448 (Wis. 1900).

did so explicitly. *Ayers*, 538 U.S. at 145; *Morgan*, 486 U.S. at 337-38 (holding that, because Congress abrogated some common-law rules explicitly but did not address "the equally well-established doctrine barring the recovery of prejudgment interest, ... we are unpersuaded that Congress intended to abrogate that doctrine *sub silentio*"); *Bailey* v. *Central Vt. Ry.*, 319 U.S. 350, 352 (1943); see also *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*"). Indeed, during the debates on FELA, legislators expressly averted to the presumption that Congress does not depart from the common law except when it does so expressly. See 40 Cong. Rec. 4601, 4603-04 (1906) (statement of Rep. Driscoll) ("[g]enerally a statute in derogation of the common law is strictly construed 'expressio unius est exclusio alterius,'" and so Congress should make explicit any changes it intends to the common law). This Court has specifically noted that proximate cause was not one of the doctrines that Congress abrogated. Congress in 1908 "abolished the fellow servant rule, substituted comparative negligence for the strict rule of contributory negligence, and allowed survivors' actions for tort liability," and in 1939 abrogated the defense of assumption of the risk, but there still remained the common law requirement that the plaintiff prove "whether the carrier was negligent and whether that negligence was the proximate cause of the injury." *Tiller*, 318 U.S. at 62-67.

Indeed, an implicit abrogation of proximate cause in the 1908 statute would be particularly unlikely given the accepted view that proximate cause was "too firmly founded on reason and justice to be lost sight of in any discussion of liability for negligence." Beach, *supra* § 305, at 446. Such a standard was deemed necessary, lest a defendant's liability run forever:

> The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and obser-

> vation convince us we cannot press our inquiries with safety.

T. Cooley, *A Treatise on the Law of Torts* 73 (2d ed. 1888), *quoted in Associated Gen. Contractors of Calif.*, 459 U.S. at 532 n.24; 1 J.G. Sutherland, *A Treatise on the Law of Damages* 57 (1883). Proximate cause identifies "not what philosophers or logicians will say is the cause" but "[t]he practical question for a jurist [as to] whether the tortious conduct of any human being has had such an operation in subjecting a plaintiff to damage as to make it just that the tortfeasor should be held liable to compensate the plaintiff." Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 104 (1911).

4. Strong confirmation of proximate cause's entrenched status in FELA came during consideration of the 1939 amendment to the Act. The House considered an amendment which would have abolished the defense of assumption of risk "where the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death of such employees." 84 Cong. Rec. 10,709, 10,710 (1939) (emphasis added). In testimony before a House Committee, however, the General Counsel for the Brotherhood of Railroad Trainmen argued that this language was wholly unnecessary:

> [T]he word "proximately" is pure surplusage, because unless the negligence proximately caused the injury there can be no recovery.... Leaving it in I do not believe adds anything to it unless possibly some confusion, because it is not in any of the other sections. You might just as well use the word "proximately" in the first part of the act as to use it there; and, of course, it is not used in the first part of the act.

Hearing Before the H. Comm. on the Judiciary, 76th Cong., 5 (Apr. 17, 1939) (statement of Tom J. McGrath, General Counsel, Brotherhood of Railroad Trainmen) (House Unpub-

lished Hearings Collection). This amendment was ultimately rejected and the plain inference is that the term was unnecessary.

B. *Rogers* Did Not *Sub Silentio* Overrule Decades Of Precedent Establishing A Federal Rule Of Proximate Cause Under FELA.

The claim that *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), silently overturned settled law and abolished the proximate cause requirement is groundless. Far from overruling this Court's numerous proximate-cause precedents, *Rogers* expressly relied upon them. *Infra* at 39.

Rogers, instead, was concerned with a different issue—it rejected a particular common-law conception of "proximate cause," which erroneously held that in cases of multiple causation, plaintiffs must show that the railroad's wrongful act was the "sole, efficient, producing cause of injury." 352 U.S. at 506. That much-criticized formulation had crept into many common-law decisions of the time.[18] The concept of "sole proximate cause" was contrary to the logic of the common

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[18] *See* Prosser, *supra*, at 468 & n.16 (1953) ("Most of the decisions [adopting contributory negligence as a bar to recovery] have talked about 'proximate cause,' saying that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury. But this cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else." (footnote omitted)); Fleming James, Jr., *Contributory Negligence*, 62 Yale L.J. 691, 693-94 & nn.14-16 (1953) ("Earlier legal thinking had been very much dominated ... by the notion that while there may be many causes of an injury in a lay or scientific sense, yet the law should quest for a sole or principal *proximate* cause."); *id.* at 696-97; Leon Green, *Contributory Negligence and Proximate Cause*, 6 N.C. L. Rev. 3, 11-12 (1927); *see also* John G. Phillips, *The Sole Proximate Cause "Defense": A Misfit in the World of Contribution and Comparative Negligence*, 22 S. Ill. U. L.J. 1, 15 (1997) ("In effect, sole proximate cause defeats the purpose of a comparative negligence system and simply replaces contributory negligence with a pseudonym."); *see also supra* n.11.

law and dominant conceptions of proximate cause,[19] and it was flatly contrary to the plain language of FELA and this Court's precedents. See 45 U.S.C. § 51 (liability if injury resulted "in whole or in part" from railroad negligence); McBride, *supra*, § 66, at 157 ("if the cause of action is established by showing that the injury resulted in whole or in part from the defendant railway company's negligence, the statute cannot be nullified and the right of recovery defeated by calling the plaintiff's act the proximate cause of the injury"). *Rogers* simply discarded that unduly stringent strand of proximate cause doctrine that was inconsistent with the statute. The Court reaffirmed that in circumstances where the jury could find either the employee's or the railroad's negligence to be the legal cause of the injury, the claim against the railroad had to go to a jury even if the railroad's contribution to the injury was relatively slight. 352 U.S. at 506.

Rogers was one of a series of cases in which this Court reversed lower courts that misused the term "proximate cause" in this fashion to deny plaintiffs a jury determination of their FELA claim against the railroad. Thus, in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, the lower court had held that a railroad's SAA violation (which caused a freight train to come to a sudden stop because of a brake malfunction) was not the proximate cause of the employee's death; it had reasoned that, because the employee could have avoided the accident if he had not been negligent in failing to brake the motor car that was following the train on the same tracks, the railroad's violation of the SAA was only a "'cause' in the 'philosophical sense'" of the fatal accident. In reversing, this Court held that "the introduction of dialectical subtleties can serve no useful interpretative purpose," given FELA's plain declaration "that

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[19] *Restatement (Second) of Torts* § 430 cmt. d, at 428 ("In order that a negligent actor may be liable for harm resulting to another from his conduct, it is only necessary that it be a legal cause of the harm. It is not necessary that it be *the* cause, using the word "the" as meaning the sole and even the predominant cause.").

railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained." *Id.* at 523-24. But, in reversing the lower court's *application* of the proximate-cause doctrine to the facts of that case, *Coray* explicitly stated that the proximate-cause standard of *Davis* remained the rule under FELA: "petitioner was entitled to recover if this defective equipment was the sole *or a contributory proximate cause* of the decedent employee's death. *Davis v. Wolfe*, 263 U.S. 239, 243; *Spokane & I.E.R. Co. v. Campbell*, 241 U.S. 497, 509-10." See *Coray*, 335 U.S. at 523 (emphasis added). And *Campbell*, upon which *Coray* relied, held (in language that *Rogers* later would mirror) that "the violation of the safety appliance act need not be the sole efficient cause, in order that an action may lie." 241 U.S. at 510; see also *Stringfellow*, 290 U.S. at 325-26 (interpreting a Florida comparative-fault statute; "sole proximate cause" need be proved only to defeat recovery entirely).

In *Rogers*, the state court had improperly taken the case from the jury despite evidence that the railroad's negligence was one of two possible legal causes of his injury. The plaintiff had been burning weeds on a sloping track bed. When a train passed, it fanned the fire he had created, and forced the employee back onto a culvert where he slipped on gravel and fell off the culvert, injuring himself. The employee adduced evidence that the railroad was negligent in requiring him to work near the tracks where passing trains could fan the flames around him, and in failing to maintain the surface of the culvert; the railroad countered that the plaintiff was negligent in not watching his fire. 352 U.S. at 502-04. The Court expressly stated that, on the evidence presented, the jury could have found either the employee or the railroad to have been the legal cause of the injury. *Id.* at 504.

But, even though the jury had found for the plaintiff, the Missouri Supreme Court reversed, in part on the ground that the employee's "conduct was at least as probable a cause for

his mishap as any negligence of the [railroad], and that in such case there was no case for the jury." *Id.* at 505. The Missouri decision amounted to an erroneous ruling that "there is no jury question in actions under this statute ... unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected." *Id.* at 505-06. Thus, this Court held, the state court had improperly invoked "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the *sole, efficient, producing cause* of injury." *Id.* at 506 (emphasis added). A rule that the railroad's negligence must be the "sole" cause of injury is contrary to the statutory directive that renders railroads liable if they are a cause "in whole or in part" of the employee's injury, 45 U.S.C. § 51, and likewise is inconsistent with basic principles of causation, see *supra* note 18. "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506 & n.11 (citing *Coray*, 335 U.S. 520). If that test is met, "a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Id.* at 507.

The *Rogers* rule is that when there is evidence sufficient to support a verdict against the railroad (*i.e.*, to support a finding that the railroad's negligence was one proximate cause of the injury), no matter how slight its causal contribution relative to other causes, as well as evidence to support a finding that the plaintiff's negligence also was a legal cause of the injury, *id.* at 504, the plaintiff's claim against the railroad must go to the jury, *id.* at 506. The existence of a jury question is not "dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* Nothing in *Rogers* questions the longstanding FELA rule for determining when a railroad's negligence is a legal cause

of the injury—namely, that the railroad's wrongful act must be "a proximate cause of the accident which results in his injury," and not "merely create[] an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis*, 263 U.S. at 243; see also *Brady*, 320 U.S. at 483.

Rogers' discussion of employer negligence playing the "slightest" part in injury, 352 U.S. at 506, likewise reaffirms the traditional proximate-cause standard under FELA for cases involving multiple causation. At the time FELA was enacted, such language was not used in contradistinction to proximate cause, but rather to explain that the relative significance of a negligent act that proximately caused injury did not affect liability:

> The doctrine that contributory negligence in any degree, *however slight*, will bar a recovery, requires that this negligence should *contribute proximately* to produce the injury. In this view it was held error for a court to refuse to charge that, if the jury believe from the evidence that the plaintiff was guilty of negligence which, combined with the defendant's negligence, produced the accident so that both acts constituted *the proximate cause of the injury*, then the negligence of the plaintiff, *however slight*, would bar recovery.

7 Edward F. White, *A Supplement to the Commentaries on the Law of Negligence of Seymour D. Thompson, LL. D.* § 170, at 25 (1907) (footnotes omitted) (emphases added).

Courts of the era commonly employed this same formulation in FELA cases to hold that the railroad could be held liable if its negligence was a proximate cause, even if its causal contribution was slight relative to that of the employee's negligence. *E.g.*, *Hines* v. *Sweeney*, 201 P. 165, 170 (Wyo. 1921) ("Under this act the railroad company is liable, if its negligence contributes proximately to the injury, no matter how slightly, and no matter how great may be the negligence of

the employee."); *New York Chi. & St. Louis R.R.* v. *Niebel*, 214 F. 952, 955 (6th Cir. 1914) (a railroad "is liable, if through other employés it is guilty of any causative negligence no matter how slight in comparison to that of plaintiff"); *Atlantic Coast Line R.R.* v. *McIntosh*, 198 So. 92, 96 (Fla. 1940) (Brown, J., expressing the opinion of the court with regard to this issue and dissenting in part). *Rogers*' use of this terminology should be understood in the same way—as simply reaffirming the well-established rule of proximate cause, and reversing an unduly narrow requirement of sole cause.

This reading of *Rogers* is confirmed by the fact that, far from abrogating this Court's proximate-cause precedents under FELA, *Rogers* explicitly relied upon them. It derives its "test of a jury case" from *Coray*, see *Rogers*, 352 U.S. at 506 & n.11, and *Coray* (as noted above) reaffirmed, citing *Davis*, that the railroad's negligence must be either "the sole or a contributory proximate cause" of the employee's injury. *Coray*, 335 U.S. at 523. Moreover, *Rogers* observed that in cases involving violations of the SAA, the jury could not consider the plaintiff's contributory negligence, and "[t]he only issue then remaining is causation," 352 U.S. at 507 & n.13 (citing *Carter*, 338 U.S. 430). And *Carter* (which itself quotes *Coray*, 335 U.S. at 523) likewise held that the railroad can only be held liable if "the jury determines that the defendant's breach is 'a contributory proximate cause' of injury." *Carter*, 338 U.S. at 435.

It is significant that none of the dissenting justices in *Rogers* understood the majority decision as a sweeping abrogation of this Court's numerous earlier precedents establishing proximate cause under FELA. Justice Frankfurter would simply have dismissed the writ as improvidently granted because he regarded *Rogers* as yet another "insignificant" FELA case about the sufficiency of the evidence. *Ferguson*, 352 U.S. at 546 (Frankfurter, J., dissenting). (Justice Frankfurter filed a dissent in *Ferguson* that also applied to *Rogers* and

two other cases.) He noted that, although the Act abolished certain defenses to liability, it was the "historic cause of action for negligence as it has developed from the common law," *id.* at 538, with the proviso that "on the question of causality, the statute had tried to avoid issues about 'sole proximate cause,' meeting the requirement of a causal relation with the language that the injury must result 'in whole or in part' from the employer's negligence," *id.* at 538 n.7. That is, Justice Frankfurter gave *Rogers* precisely the interpretation set forth above, and did not understand the majority to have abolished proximate cause in contravention of existing precedent.

Furthermore, it would be passing strange for this Court in *Rogers* to overrule silently a long and consistent line of its precedents from the inception of the Act establishing proximate cause as the federal rule under FELA, and to adopt in its stead something as radical as "slight" cause as the basic standard for defendant's liability. "[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).

Nor did the petitioner in *Rogers* ever ask the Court to overrule *Davis* or any other precedent of this Court establishing proximate cause as the FELA standard. Indeed, he saw no conflict between proximate cause and the "in whole or in part" language of section 1. He affirmatively argued that "by reason [of the railroad defendant's negligence], plaintiff was caused to fall and to be injured thereby all of which *directly and proximately resulted, in whole or in part*, from the negligence of the defendant as aforesaid." Brief for Petitioner at 9, *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) (No. 28) (emphasis added); *id.* at 4, 19, 24-26 (arguing that the railroad's "negligence was the *proximate cause* of petitioner's injury" (capitalization omitted; emphasis added)). The petitioner simply contended that by allowing recovery for injuries caused "in part" by the railroad's negligence, FELA had re-

jected "the old concept of proximate cause," wherein "th[e] cause must have been direct, the complete, the responsible, the efficient cause of the injury." *Id.* at 25. The railroad should be held liable, he argued, even if "some other factor may logically be said to be more influential in producing the injury." *Id.* at 27. The Court in *Rogers* did what petitioner suggested: it rejected unduly narrow formulations of proximate cause that inappropriately barred recovery in multiple causation cases, but did not question the federal rule of proximate cause as the standard for legal causation.[20]

Under these circumstances, this Court's longstanding interpretation of FELA must stand. A FELA claim cannot go to the jury if the railroad's wrongful act "is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis*, 263 U.S. at 243. In establishing a "test for a jury case," *Rogers* simply adds that, if the evidence would permit a jury to choose among multiple possible proximate causes of the injury (such as the employee's and the railroad's negligence),

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[20] In cases arising after *Rogers*, this Court has stated in dicta that FELA employs a "relaxed standard" of causation, *Gottshall*, 512 U.S. at 543, and that a FELA plaintiff "is not required to prove common-law proximate causation," *Crane* v. *Cedar Rapids & Iowa City Ry*, 395 U.S. 164, 166 (1969). Those statements are true insofar as they mean that *Rogers* rejected the older common law conception of "proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Rogers*, 352 U.S. at 506. Indeed, the proximate cause holding of *Davis* was regarded as a "liberal" interpretation of the "resulting in whole or in part" language of FELA. *Brady*, 303 U.S. at 15. This Court has expressly recognized that *Davis* remains good law in a case decided after *Rogers*. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 434 (1958). But if these statements are construed to mean that *Rogers* abrogated altogether even the federal rule of proximate cause, such dicta would not be controlling, and could not support the overruling of the many precedents of this Court affirming that rule. *Humphrey's Executor* v. *Myers*, 295 U.S. 602, 626 (1935).

the claim against the railroad must be allowed to go to the jury even if the railroad's negligence played the "slightest" part in the injury; such negligence need not be "the sole, efficient, producing cause of injury." 352 U.S. at 506.

C. Applying Equivalent Proximate-Cause Standards To Defendant Negligence And Plaintiff Contributory Negligence Is The Best Rule As A Matter Of Policy.

Recognizing a rule of proximate cause that applies to both plaintiff and defendant negligence is not only compelled by a century's worth of precedents, both under common law and FELA. It also makes good sense. The wisdom of this rule is confirmed by the fact that petitioner has been unable to identify any other tort law system that makes liability depend upon a finding of slightest cause, nor is petitioner aware of a single contributory- or comparative-negligence regime, whether past or present, that employs different causation standards for plaintiff and defendant negligence. Proximate causation remains the rule throughout tort law, and is widely adopted by Congress in statutes that provide damages remedies for injury to person and property. As elaborated below, there are a variety of reasons for such uniformity.

1. Proximate Cause Is Widely Recognized As A Fundamentally Just Standard.

Proximate cause is not an anachronism; it continues to be the rule at common law today. See *Restatement (Second) of Torts* §§ 281(c), 430-462; *Restatement (Third) of Torts: Apportionment of Liability* § 3. Notably, this Court repeatedly has interpreted statutes and common-law rights of action that do not specify a causation standard—including statutes that might reasonably be read as requiring mere but-for causation—as incorporating the traditional proximate-cause standard. See *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1995-98 (2006); *Dura Pharms.* v. *Broudo*, 544 U.S. 336, 342-48 (2005); *Sofec*, 517 U.S. at 836-39 (1996); *Holmes* v. *Secu-*

rities Investor Prof. Corp., 503 U.S. 258, 268 (1992); *Associated Gen. Contractors of Cal.*, 459 U.S. at 527; *Southern Pac. Co.*, 245 U.S. at 533-34.

In *Associated General Contractors*, for instance, this Court addressed the causation standard under section 4 of the Clayton Act. That statute permits recovery for any injury to business or property "*by reason of* anything forbidden by in the antitrust laws." 15 U.S.C. § 15. Given this capacious language, "[a] literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation." 459 U.S. at 529. Nonetheless, just as with FELA, the statute's legislative history required an inquiry into its "common-law background," *id.* at 531; see also *id.* at 532, and this Court recognized that the common law long has required a showing of proximate cause. See *id.* at 532 & n.24 ("'Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one "to recover *any* damage."' 3 J. Lawson, *Rights, Remedies, and Practice* 1740 (1890)."); *accord id.* at 533-35 & n.30.

This Court's analysis has been the same in contexts as varied as admiralty, RICO, and the securities laws. In *Sofec*, the Court recognized proximate cause as the necessary standard in a common-law admiralty case. "[P]roximate causation principles are generally thought to be a necessary limitation on liability," and a contrary rule would lead to "extreme results"; after all, "'[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.'" *Sofec*, 517 U.S. at 838.

This Court reached a similar conclusion in its recent cases defining the causation standard under the Racketeering-Influenced Corrupt Organizations (RICO) Act. RICO, like the Clayton Act, employs a broadly framed causation standard. As in cases arising under the antitrust laws, this Court found it highly "unlikel[y] that Congress meant to allow" re-

covery under RICO for mere "but-for" causation. *Holmes*, 503 U.S. at 266. It reasoned that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Id.* at 269. Just this past Term, this Court in *Anza* reaffirmed the proximate-cause rule under RICO, recognizing that "without a showing of "some *direct relation* between the injury asserted and the injurious conduct alleged," courts have "difficulty" in "attempt[ing] to ascertain the damages caused by some remote action," and there can be no end to litigation. *Anza*, 126 S. Ct. at 1998 ("[t]he element of proximate causation ... is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation").

Dura presented a similar issue under the securities laws, where neither the common law nor the subsequently enacted statute specified the necessary causal connection; rather, a statutory provision merely provided that plaintiffs must prove "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" 544 U.S. at 345-46 (quoting 15 U.S.C. § 78u-4(b)(4)). As in each of the other cases cited above, this Court looked to "the common-law roots" of the cause of action, *id.* at 344, and in so doing held that the plaintiff "need[s] to prove proximate causation," *id.*

Substituting "slightest" cause as the standard for legal cause under FELA in place of proximate cause would cause a dramatic and unwarranted expansion of railroad liability, and would lead to absurd results. Tort law has always differentiated legal cause from cause-in-fact, see *Restatement (Second) of Torts* § 435, but a "slightest cause" standard—or, as some courts have termed it, a "'featherweight'" causation standard, *Johnson* v. *Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988)—is not materially different from but-for causation. Applying such a standard "would be but a lottery, and purposeless." *Porter* v. *Bangor & Aroostook R.R.*, 75 F.3d 70, 72 (1st Cir. 1996). Absent a requirement that the railroad's

negligence be a proximate cause of the employee's injury, FELA becomes less a tort statute than a worker's compensation statute for any wrongful act, but without the limitations on recovery that typically are embodied in worker's compensation statutes. See *Carter*, 338 U.S. at 437-38 (Frankfurter, J.).[21] Congress did not intend FELA to be a worker's compensation regime, and it certainly did not intend what the Missouri rule would create—a worker's compensation regime with tort damages. See *Gottshall*, 512 U.S. at 543 ("That FELA is to be liberally construed, however, does not mean that it is a workers' compensation statute."); *Ellis* v. *Union Pac. Ry.*, 329 U.S. 649 (1947) ("The [FELA] does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur."); *Inman* v. *Baltimore & Ohio Ry.*, 361 U.S. 138, 140 (1959); see Br. of Association of American Railroads at 15-16 (contrasting tort and worker's compensation insurance schemes).

Indeed, the very purpose of proximate cause is to identify the point beyond which causation is so tangential that liability would be unjust. This is a legal and moral judgment about where liability should lie. See *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 351-52 (1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a

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[21] FELA's causation standard also applies to the BIA and SAA, a fact that heightens the practical impact of the lower court's mistaken slightest-cause standard. Under those statutes, the railroad's duties are absolute and the contributory negligence of the employee cannot be considered to reduce damages. *See* 45 U.S.C. § 53; *Rogers*, 352 U.S. at 507 n.13. Congress intended absolute liability for injuries that are the "'natural and probable consequence[s]'" of the statutory violation, *Brady*, 320 U.S. at 483, but not for all injuries with only the slightest causal connection to a violation, including ones in which the violation "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury," *Davis*, 263 U.S. at 243.

certain point."); *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 477 n.13 (1982) (quoting same). Because but-for causation (or "cause in fact") cannot and does not place appropriate limits on liability—after all, the consequences of an event stretch forward indefinitely into the future, and its causes equally far into the past—the doctrine of proximate cause (today as in the past) is necessary "to hold the defendant's liability within some reasonable bounds." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 44, at 302 (5th ed. 1984); see also *id.* § 43, at 300; *id.* § 41, at 264 ("As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability."); 1 Dobbs, *supra*, § 181, at 445-47.

In this regard, it would be fundamentally irrational to impose liability for less-than-proximate causes. By definition, this would mean assigning liability for causes where "the law is [not] justified in imposing liability." *Prosser & Keeton*, *supra*, § 41, at 264. Indeed, the rule respondent favors (Opp. 5-6) would extinguish the related doctrine of superseding cause, see *O'Donnell*, 338 U.S. at 394 n.7, such that the railroad would now presumably be responsible for Acts of God, such as lightning striking a worker who stood outside a train that was derailed by an engineer's negligence. Whatever uncertainty may attend the doctrine of proximate cause, the alternative is far worse. *Standard Oil Co. of N.J.* v. *United States*, 340 U.S. 54, 61 (1950) ("proximate cause ... cannot [be] predict[ed] with certainty," but "[l]ong experience with the proximate cause method in American and English courts have at least proven it adaptable and useful" in various contexts). When the inquiry into causation is untethered from more than a century's worth of common-law accretion regarding appropriate causal limits, the only possible result is that liability will be imposed for the most remote and the most unforeseeable of causes.

Predictably, that is precisely what has occurred in jurisdictions that have misinterpreted *Rogers* as imposing liability for less-than-proximate causes. In *Parker* v. *Atchison, Topeka & Santa Fe Railway*, 70 Cal. Rptr. 8 (Cal. Ct. App. 1968), the California Court of Appeal addressed a plaintiff's FELA claims that arose when he fell down twice—once on "terrain [that] was rutted and rough" (despite "visibility [that] was fair"), and the second time because there was "oil and grease on his shoe." *Id.* at 9. The court reversed a jury verdict for the defendant because the court had given a proximate-cause instruction, and concluded that even these meager allegations could support FELA liability: "Although the burden upon the plaintiff in proving causation in an F.E.L.A. case can be weighed neither in pounds nor ounces, it is a substantially lighter burden than that imposed upon him by [a standard proximate-cause instruction]." *Id.* at 10-11. Casting aside proximate causation in favor of a standard that "can be weighed neither in pounds nor ounces," *id.* at 10, leads inevitably to absurd cases like *Parker*, where liability can be imposed because an employee got oil on his shoe. See also, *e.g.*, *Peters* v. *CSX Transp., Inc.*, No. 04-cv-077, 2006 WL 42179, at *4 (W.D. Ky. Jan. 3, 2006) (denying summary judgment for a railroad when an *unrelated third party* ran into a barricade held by plaintiff); *Bailey* v. *Norfolk & W. Ry.*, 942 S.W.2d 404, 408 (Mo. Ct. App. 1997) (upholding jury verdict; the employee's work schedule and bad sleeping conditions in a railroad dormitory purportedly "disrupt[ed] ... [his] circadian clock," and thereby caused gastrointestinal disease and cardiovascular problems). Such a standard repudiates a century's worth of the common law and transforms FELA, by judicial amendment, into the worker's compensation statute—with tort damages—that Congress did not enact.

2. Divergent Causation Standards Are Inequitable And Hard To Administer.

Rogers thus did not create a diluted standard of causation for railroad negligence, while leaving the traditional proxi-

mate cause standard for employee negligence. Such an interpretation of *Rogers* cannot be reconciled with any rational conception of the statutory scheme, for divergent causation standards would be difficult to implement, and confusing for juries. To adopt the Missouri rule would require courts to instruct juries separately as to the different causation thresholds for plaintiffs and defendants, and thus not only to explain proximate cause, but also to differentiate that sometimes elusive concept from "slightest cause." See *Restatement (Third) of Torts: Apportionment of Liability* § 3 rptrs.' note to cmt. a, at 37 (different rules of causation would be "difficult to administer when different rules govern different parts of the same lawsuit").

These difficulties are all the greater in cases involving multiple parties. In a FELA case involving a claim for contribution against third parties, for instance, the railroad would be a defendant vis-à-vis the employee, but a plaintiff vis-à-vis the third parties. See *id.* (stating that different rules for plaintiffs and defendants should not be used because "[a] party could be both a plaintiff and a defendant"). Thus, under the Missouri rule, the jury would have to be instructed that the defendant's conduct vis-à-vis the plaintiff should be measured by a different standard than his conduct vis-à-vis third parties. This rule is senseless:

> [U]nless there are strong reasons to the contrary, the rules for proving plaintiff's negligence should be the same as the rules for proving defendant's negligence. The same party might be a plaintiff for part of a lawsuit and a defendant for another part of a lawsuit. It would be difficult to have the judge and jury perform different functions in evaluating that party's conduct as a plaintiff from those performed in evaluating that party's conduct as a defendant.

Id. § 4 rptrs' note to cmt. c, at 50-51.

What is more, even if the jury could follow such inevitably confusing instructions, requiring a defendant to prove a higher threshold of causation would lead to inequities. Imagine a case, for instance, in which a railroad defendant is 10% negligent, the plaintiff is 30% contributorily negligent, and two other tortfeasors whom the plaintiff does not sue (Δ_2 and Δ_3) are also 30% negligent. If the four parties were "slightest causes" (but not proximate causes, because there was a superseding cause of injury), under the Missouri rule the plaintiff could recover his full damages from the railroad (because FELA imposes joint and several liability, see *Ayers*, 538 U.S. at 159-66), but the railroad could not recoup any damages via contribution from Δ_2 or Δ_3, because contribution requires proximate cause, see *supra* at 20. Indeed, it is not uncommon for two different railroads to be the cause of a worker's injuries, such as where two trains collide, or one railroad operates over another's tracks. Congress would have had no reason to want a lesser causation standard to apply to one of the railroads simply because it was the employer of the injured worker. Applying the accepted standard of proximate cause to both the FELA plaintiff and defendant fulfills Congress's purpose in enacting FELA that all parties "bear the burden" of their own conduct in the apportionment of damages, H.R. Rep. No. 60-1386, at 1, and promotes just administration of contribution remedies as between the employing railroad and other tortfeasors.

Notably, the Missouri Supreme Court has not sought to explain why the use of different standards in this fashion has any grounding in policy. On the contrary, the MAI rely simply on the notion that *Rogers* abrogated the proximate-cause rule for plaintiffs, but left it in place for defendants. MAI 24.01 committee cmt. This is simply incorrect, as shown above.

Finally, if *Rogers* did abandon the settled rule of proximate cause established by this Court, it should be overruled. Alternatively, if this Court were to rule that "slightest cause" is the

standard that a jury should apply to railroad negligence, there is no basis for maintaining divergent standards, and that same standard must be applied to claims of employee contributory negligence as well. *Page* v. *St. Louis Sw. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965). But there is no need for the Court to take this route. *Rogers* did not undermine this Court's prior construction of the causation provisions of section 1.

* * * *

The longstanding rule at common law is that both defendant negligence and plaintiff contributory negligence are measured by the same causal yardstick—proximate cause. Nothing in FELA abrogates this rule; on the contrary, at least 20 of this Court's decisions reaffirm and clarify the common-law rule. Proximate cause is the rule for both negligence and contributory negligence under FELA. Any other standard would contravene well-established principles of tort law, and would lead to unjust and perverse results that Congress did not intend.

CONCLUSION

The judgment should be reversed and the case remanded for a new trial.

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In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

TIMOTHY SORRELL,

Respondent.

On Writ of Certiorari to the Missouri Court of Appeals

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

A. Statutory Background 2

B. Factual Background 4

C. Trial Court 5

D. Missouri Court of Appeals 8

E. Missouri Supreme Court 10

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED BECAUSE NORFOLK SOUTHERN NEVER ARGUED IN THE STATE COURTS BELOW, OR IN ITS PETITION FOR CERTIORARI, AS IT DOES HERE, THAT THE FELA REQUIRES A PLAINTIFF TO PROVE PROXIMATE CAUSATION 12

II. THE FELA REQUIRES A RELAXED CAUSATION STANDARD FOR RAILROAD NEGLIGENCE, NOT PROXIMATE CAUSE AS NORFOLK SOUTHERN INCORRECTLY ASSERTS 20

A. Congress Lowered The Causation Standard For Railroad Negligence In Order To Serve The FELA's Purpose Of Facilitating Worker Recovery 22

B. In *Rogers*, This Court Held That The FELA Does Not Require Proof Of Proximate Causation for Railroad Liability 25

C. The Holding In *Rogers* Is Well-Established 27

1. *This Court Has Repeatedly Reaffirmed That The FELA Does Not Require Proof of Proximate Causation for Railroad Liability* 27

2. *The Courts of Appeals Have Uniformly Recognized That The FELA Does Not Require Proof of Proximate Causation for Railroad Liability* 29

D. *Rogers* Was Not Merely Concerned With Comparative Negligence 31

E. *Rogers* Is Consistent With The FELA Decisions That Came Before It 34

F. Norfolk Southern's Policy Arguments Do Not Justify Judicially Overruling *Rogers* In Violation of *Stare Decisis* 36

III. THE INSTRUCTION BELOW CONTAINING DUAL CAUSATION STANDARDS WAS NOT REVERSIBLE ERROR 40

A. The FELA Creates A Workable System Where The Causation Standard For The Railroad's Negligence Is Lighter Than That Applicable To Plaintiff's Contributory Negligence 40

B. Any Error In Instructing The Jury Using A Proximate Cause Standard For Contributory Negligence Was Harmless 46

CONCLUSION 47

TABLE OF AUTHORITIES

CASES — Page

Adams v. Robertson, 520 U.S. 83 (1997) 14, 47
Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 13
Bailey v. Central Vermont Railway, Inc., 319 U.S. 350 (1943) 23
Bailey v. Norfolk & W. Ry., 942 S.W.2d 404 (Mo. Ct. App. 1997) 39
Barth v. Coleman, 878 P.2d 319 (N.M. 1994) 43
Bisaillon v. Casares, 798 P.2d 1368 (Ariz. Ct. App. 1990) 42
Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991) 43
Bonpua v. Fagan, 602 A.2d 287 (N.J. Sup. Ct. App. Div. 1992) 44
Campbell v. Louisiana, 523 U.S. 392 (1998) 13, 14
Cannon v. University of Chicago, 441 U.S. 677 (1979) 37
Caplinger v. Northern Pac. Terminal,, 418 P.2d 34 (Or 1966) 46
Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922) .. 47
Carpenter v. City of Belle Fourche, 609 N.W.2d 751 (S.D. 2000) 3
City of Springfield v. Kibbe, 480 U.S. 257 (1987) 13, 19
Clark v. Mo. & N. Ark. R.R. Co., Inc., 157 S.W.3d 665 (Mo. Ct. App. 2004) 38
Comeau v. Lucas, 455 N.Y.S. 2d 871 (N.Y. App. Div. 1982) 44
Congress of Indus. Org. v. McAdory, 325 U.S. 472 (1945) 14
Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) 3, 4, 22, 24, 27, 30, 41
Cook v. Caldwell Banker, 967 S.W.2d 654 (Mo. Ct. App. 1998) 15

Coray v. Southern Pac. Co., 335 U.S. 520 (1949) 20, 34
Crane v. Cedar Rapids & Iowa City Railway Co., 395 U.S. 164 (1969) 27
Cusson v. Canadian Pacific Ry. Co., 115 F.2d 430 (2d Cir. 1940) 36
Deery v. Cray, 77 U.S. 263 (1869) 47
Dennis v. Denver & Rio Grande W. R.R. Co., 375 U.S. 208 (1963) 28
Duignan v. United States, 274 U.S. 195 (1927) 13
E. Transp. Line v. Hope, 95 U.S. 297 (1877) 47
Eagle v. Redmond, 80 S.W.3d 920 (Mo. Ct. App. 2002) 16
Eglsaer v. Scandrett, 151 F.2d 562 (7th Cir. 1945) 36
Eickelman v. Illinois Cent. Gulf R. Co. 714 S.W. 2d 611 (Mo. Ct. App. 1986) 38
Fare v. S. Ry. Co., 438 F2d 933 (11th Cir. 1971) 31
Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) 45
Fletcher v. Union Pac. R.R. Co., 621 F.2d 902 (8th Cir. 1980) 30
Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108 (1963) 27
Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) 30
Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243 (7th Cir. 1974) 37
Heath v. Alabama, 474 U.S. 82 (1985) 14
Herb v. Pitcairn, 324 U.S. 117 (1945) 14
Hernandez v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432 (4th Cir. 1999) 30
Hertz v. Raks Hospitality, Inc., 196 S.W.3d 536 (Mo. Ct. App. 2006) 16
Hickey v. Zezulka, 487 N.W.2d 106 (Mich. 1992) 43, 44

Hilton v. South Carolina Public Railways Com'n, 502 U.S. 197 (1991) 37
Hines v. Consol. Rail Corp., 926 F.2d 262 (3d Cir. 1991) 30
Holbrook v. Norfolk S. Ry. Co., 414 F.3d 739 (7th Cir. 2005) 30
Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 41
Howard v. Ill. Cent. R.R. Co., 207 U.S. 463 (1908) 2
Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) 37
Illinois v. Gates, 462 U.S. 213 (1983) 14
Illinois v. McArthur, 531 U.S. 326 (2001) 13
Inman v. Baltimore & Ohio R.R. Co., 361 U.S. 138 (1959) 28
Kernan v. American Dredging Co., 355 U.S. 426 (1958) 28
Little v. Nat'l R.R. Passenger Corp., 865 F.2d 1329 (Table), 1988 WL 145095, 1 (D.C. Cir. 1988) 31
McGoldrik v. Compagnie Generale, 309 U.S. 430 (1940) 14
Messick v. Atchison, Topeka & Santa Fe Ry. Co., 924 S.W.2d 620 (Mo. Ct. App. 1996) 38
Miller v. Am. President Lines, Ltd., 989 F.2d 1450 (6th Cir.1993) 45
Mohawk Indus. Inc. v. Williams, 126 S. Ct. 2016 (2006) 15
Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988) 37
Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So.2d 70, 77-78 (La. Ct. App. 1989) 44
Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981) 45
Napier v. F/V DEESIE, Inc., 454 F.3d 61 (1st Cir. 2006) 30
NCAA v. Smith, 525 U.S. 459 (1999) 13

Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135 (2003) 3, 21, 27, 39, 41, 42
O'Day v. Chicago River & Ind. R.R. Co., 216 F.2d 79 (7th Cir. 1954) 36
Ohio v. Robinette, 519 U.S. 33 (1996) 20
Oglesby v. S. Pac. Transp. Co., 6 F.3d 603 (9th Cir. 1993) 31
Page v. St. Louis Southwestern Ry. Co., 349 F.2d 820 (5th Cir. 1965) 46
Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) 41
Parker v. Atchison, Topeka & Santa Fe Railway, 263 Cal. App. 2d 675 (Cal. Ct. App. 1968) 38
Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447 (1936) 14
Peters v. CSX Transp., Inc., No. 04-CV-077, 2006 WL 42179 (W.D. Ky. Jan. 3, 2006) 39
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 44
Randall v. Sorrell, 126 S. Ct. 2479 (2006) 36
Richards v. Consol. Rail Corp., 330 F.3d 428 (6th Cir. 2003) 30
Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957) ..... *passim*
Rogers v. Missouri Pac. R.R. Co., 284 S.W.2d 467 (Mo. 1955) 25, 26, 30, 31, 32, 34, 36
Schulz v. Pa. R.R. Co., 350 U.S. 523 (1956) 35
Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 44
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939) 44
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 13
State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154 (1945) 14
Summers v. Mo. Pac. R..R.. Sys., 132 F.3d 599 ..... 20, 30
Syverson v. Consol. Rail Corp., 19 F.3d 824 (2d Cir. 1994) 30

Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54 (1943) 22
Travis v. Kansas City S. Ry. Co., 977 S.W.2d 512 (Mo. Ct. App. 1998) 38
Turner v. Norfolk & Western Ry. Co., 785 S.W.2d 569 (Mo. Ct. App. 1990) 38
United States v. Bestfoods, 524 U.S. 51 (1998) 13
Urie v. Thompson, 337 U.S. 163 (1949) 3, 4
York v. Missouri Pacific R. Co., 813 S.W.2d 61 (Mo. Ct. App. 1991) 38
Youakim v. Miller, 425 U.S. 231 (1976) 13
Webb v. Webb, 451 U.S. 493 (1981) 14
Wilkerson v. McCarthy, 336 U.S. 53 (1949) 22
Williams v. Long Island R.R. Co., 196 F.3d 402 (2d Cir. 1999) 30
Wilmoth v. Chicago, Rock Island & Pac. R.R., 486 S.W.2d 631 (Mo. 1972) 15
Wolfe v. North Ca., 364 U.S. 177 (1960) 14

STATUTES

45 U.S.C. §§ 51-55 22
45 U.S.C. § 51 ..... 1, 3, 4, 20, 27, 41
45 U.S.C. § 53 ..... 3, 41, 42
45 U.S.C. § 54 ..... 4, 24, 41
45 U.S.C. § 60 4
N.D. Cent. Code §32-03.2-02 (1993) 44

RULES

Mo. Sup. Ct. R. 70.03 15
Mo. Sup. Ct. R. 83.08(b) 17
Mo. Sup. Ct. R. 84.04(e) 16

LEGISLATIVE HISTORY

S. Rep. No. 60-460 (1908) 4, 22, 24
S. Rep. No. 84-661 (1939) 39
H.R. Rep. No. 60-1386 (1908) 3, 4, 22, 45
H.R. Rep. No. 75-2153 (1938) 24
40 Cong. Rec. 4605 (1906) 2
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SCHOLARLY AUTHORITY

Dan B. Dobbs, *The Law of Torts* (2001) 41
Romualdo P. Eclavea, *Applicability of Comparative Negligence Doctrine to Actions Based on Strict Liability in Tort*, 9 A.L.R. 4th 633 (1981 & Supp. 2005) 44
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Summary of the Laws of Other Countries on the Subject of Workmen's Compensation, 62nd Cong., 2d Sess. No. 643 (May 2, 1912) 3
Charles H. Traeger, III, *Legal Cause, Proximate Cause, & Comparative Negligence in the FELA*, 18 STAN. L. REV. 929 (1966) 43

OTHER AUTHORITIES

Missouri Approved Jury Instruction 17.01 (6th ed. 2002) 9
Missouri Approved Jury Instruction 24.01 (6th ed. 2002) 9
Missouri Approved Jury Instruction 32.07 (6th ed. 2002) 7, 8, 9, 10, 17
Restatement (Second) of Torts (1965) 43
Restatement (Third) of Torts: Product Liability (1998) 44

PRELIMINARY STATEMENT

Section 1 of the Federal Employers' Liability Act ("FELA" or "Act") provides that a railroad will be "liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. Consistent with *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), and, in fact, relying on that decision, Respondent Norfolk Southern Railway Company repeatedly argued in the courts below that the FELA's "in whole or in part" language lightened the causation standard for railroad liability. Indeed, Norfolk Southern objected only to a jury instruction regarding contributory negligence, because it understood that instruction to require proof of proximate causation, and it remained silent in the face of an instruction regarding railroad negligence that incorporated the FELA's "in whole or in part" language. Such failure to object is an absolute waiver under Missouri state law of any challenge to the instruction on railroad negligence. It is only in this Court, and only in its merits brief, not in its Petition for Writ of Certiorari, that Norfolk Southern, for the first time, argues that this statutory language in the negligence instruction – language which it previously thought the jury would interpret as relaxing the causation standard for contributory negligence if it were included in that instruction – does not authorize liability on a showing of less than proximate cause.

Norfolk Southern's support for a proximate causation standard for railroad negligence comes too late, and, in any event, is manifestly contrary to this Court's prior decisions, the courts of appeals' uniform interpretation of the FELA, and the policy purposes of the Act. Norfolk Southern has offered no justification for abandoning this Court's long and

well-established interpretation that the FELA does not require proof of proximate causation for railroad liability.

The only other potential issue in this case – whether a lightened causation standard applies to plaintiff's contributory negligence in an FELA case – has been abandoned by Norfolk Southern in its pursuit of a proximate cause standard for defendant's negligence. In any event, nothing in the FELA suggests that Congress intended to lighten the causation standard for plaintiff's contributory negligence. To do so would in fact be counter to Congress' express purpose to shift financial responsibility for injuries from the workers to the railroad.

STATEMENT OF THE CASE

A. Statutory Background

In response to the horrific number of injuries and deaths that were occurring on a regular basis in the railroad industry, Congress, in 1906, enacted a precursor to the FELA. 40 Cong. Rec. 4607 (1906) (expressing desire to "do something toward stopping the fearful slaughter of human life and destruction of human limbs by our railroads"). In that statute, as in the later FELA, Congress imposed liability on the railroads for their employees' injuries. *See Howard v. Ill. Cent. R.R. Co.*, 207 U.S. 463, 490 n.1 (1908). Congress hoped that by creating such liability it would encourage the railroads to take "reasonable care" of their employees. *See* 40 Cong. Rec. 4605 (1906) ("The only manner in which they can be persuaded to take reasonable care of their employees is by holding them responsible in damages for the absence of such care."); *see also* ("Were they held liable to one servant for the injuries suffered through the negligence of another in the running service they would exercise greater care.").

In 1908, this Court held that the 1906 statute exceeded Congress' legislative authority. *See Howard,* 207 U.S. at 500, 504. Reflecting the importance of the statutory protec-

tion created just two years earlier, Congress, within months, proposed the FELA as a replacement to the 1906 statute. *See e.g.,* H.R. Rep. No. 60-1386 (1908).

During deliberations leading to the enactment of the FELA, Congress decried the lack of a system in the United States for compensating railroad workers for their injuries, explaining that European countries had adopted such systems a generation earlier. 42 Cong. Rec. 4527, 4536 (1908). Although Congress expressed a desire to bring this country's laws up to the liberal standards of Europe, it did not adopt a worker's compensation system, as the European countries had done. *See, e.g., Summary of the Laws of Other Countries on the Subject of Workmen's Compensation*, 62nd Cong., 2d Sess. No. 643 at 8, 28, 29 (May 2, 1912) (Austria: all injuries compensated unless intentionally caused; Belgium: same; Britain: all injuries compensated unless due to worker's serious and willful misconduct). Nevertheless, in enacting the FELA, Congress implemented a system that moved railroad-worker protection away from the traditional common law and closer to the workers' compensation model. *See* 45 U.S.C. §§ 51, 53. Significant features of Congress' proposed new Act included its creation of liability for any injury "resulting in whole or in part" from the employer's negligence and its abrogation of the defense of pure contributory negligence, which had previously barred a plaintiff's recovery if his negligence played any role in his injuries. *See* 45 U.S.C. §§ 51, 53; *see, e.g., Carpenter v. City of Belle Fourche,* 609 N.W.2d 751, 758 n.4 (S.D. 2000) (any negligence by plaintiff would preclude recovery under pure contributory negligence).

These features of the FELA reflected Congress' goal to shift financial responsibility for injured railroad workers from those least able to carry that burden – the worker and his family – to the railroads. *See Norfolk & W. Ry. Co. v. Ayers,* 538 U.S. 135, 161 (2003); *Consol. Rail Corp. v. Gottshall,* 512 U.S. 532, 542 (1994); *see generally Urie v.*

Thompson, 337 U.S. 163, 181 (1949).[1] Indeed, Congress rejected attempt after attempt to introduce features in 1908 to the FELA that would limit this remedial function. *See, e.g.*, H.R. Rep. No. 60-1386, at 79, 80 (proposal to limit the FELA to extrahazardous railroading risks); *id.* at 92 (proposal to grant courts the discretionary power to order plaintiff's physical examination).

Consistent with these goals, the next significant substantive changes to the Act, which came in 1939, further ensured the financial protection of injured railroad workers by expanding the class of covered employees, eliminating the defense of assumption of the risk, and penalizing intimidation of workers who provide information about accidents. *See* 45 U.S.C. §§ 51, 54, 60. In the intervening decades, this Court has consistently recognized that Congress' avowedly beneficial purpose in enacting the FELA requires a policy of liberal construction so as to accomplish that purpose. *See Urie*, 337 U.S. at 180; *see also Gottshall*, 512 U.S. at 543.

B. Factual Background

On November 1, 1999, Respondent Timothy Sorrell sustained serious injuries when his nine-foot wide company truck flipped onto its side after another nine-foot wide truck driven by Norfolk Southern employee Keith Woodin attempted to pass on a sixteen-foot wide gravel road. Trial Transcript ("Tr.") 276-77, 405, 413-15, 418; Trial Exhibit ("Exh.") 13. Only invasive surgery, which involved placing a metal cage in his neck, has provided any measure of relief for the neck and shoulder pain Sorrell has experienced since the accident. *Id.* at 341-42, 346-47, 429-30, 432-35. He con-

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[1] *See also* S. Rep. 60-460, at 3 (1908) (statute intended to "adjust[] the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden.")

tinues to experience debilitating lower back pain during most everyday activities. *Id.* at 437-38, 446-47, 545.

As a consequence, Norfolk Southern has concluded that Sorrell is no longer physically able to work as a trackman. *Id.* at 442. Moreover, it will not permit him to apply for any other position within the company, because, with only a tenth-grade education, Sorrell failed the requisite examinations. *Id.* at 392, 442. Sorrell therefore lost his job and the health insurance upon which he and his wife, who has multiple sclerosis, relied. *Id.* at 438-40, 442, 545-46, 561.

Sorrell brought suit against Norfolk Southern in Missouri state court under the FELA, alleging that it negligently failed to provide him with, *inter alia*, a reasonably safe place to work, and that its negligence resulted in his severe injuries. Legal File ("L.F.") 9.[2] Sorrell sought damages to compensate for his medical expenses, lost wages, and the pain and suffering that resulted from this permanent disability. *Ibid.*

C. Trial Court.

Evidence. At trial, Sorrell testified that, while he was driving a load of coal patch to various railroad crossings, he saw another truck approaching at approximately 30 miles per hour from the opposite direction. Tr. 405, 409, 412-13. Sorrell grew concerned because the driver of the other truck, who he later learned to be Woodin, did not noticeably slow his truck, did not take advantage of the multiple opportunities he had to pull the truck off the road into a driveway or a temporary extra lane, and did not even appear to move the truck closer to the side of the road. *Id.* at 413, 418. Fearful that the two trucks could not pass each other on this narrow road, Sorrell pulled his truck as close to the right side of the road

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[2] Sorrell also asserted a claim under the FELA for injuries arising from his use of a tamping tool. L.F. 10-11. This claim is not before this Court.

as possible, slowing it to approximately five miles per hour. *Id.* at 413-14.[3]

Sorrell explained that after the cabs of the two trucks had passed one another, he tried to drive his truck toward the center of the road, but the front tire on the passenger side "washed out," and the front end dropped, causing the back end of the truck to lurch upward, the truck's load of coal patch to shift, and the truck to flip onto its side. *Id.* at 414-15. As the truck "jerked" him sideways, Sorrell hung "on for dear life." *Id.* 409, 415-16. When the truck came to rest, Sorrell released his lap belt – the only restraint system provided in the late-model truck he was driving – and fell backwards onto the truck's center console. *Id.* at 407-08, 415-16.

At trial, Woodin recounted a different version of events. Contrary to his written statement immediately after the accident, *see* Exh. 7, Woodin testified that he pulled his truck off the road and stopped when he was 400 to 500 feet from Sorrell. Tr. 239-40. Woodin stated that while waiting for Sorrell to pass, he saw Sorrell's truck veer to its right, causing the truck's front passenger-side wheel to drop off the road. *Id.* at 240. Woodin then drove past Sorrell, turned around, and came back to park behind Sorrell's truck. *Id.* at 241-44. By then, however, Sorrell's truck had tumbled into the ditch. *Id.* at 242-44.

Jury Instructions & Verdict. On the last day of witness testimony, the trial court discussed the jury instructions with the parties. Tr. 571-78. Sorrell submitted, and the trial court approved without objection from Norfolk Southern, Instruction No. 12 regarding railroad negligence, which conformed to Missouri Approved Instruction ("MAI") 24.01.[4] *Id.* 573.

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[3] Sorrell took this course of action because Norfolk Southern had not instructed him on the appropriate procedures to take if he encountered a truck on such a narrow road. Tr. 407.

[4] MAI 24.01 states:

This instruction provided, in relevant part, that the jury must find for Sorrell if Norfolk Southern's negligence "*resulted in whole or in part* in injury to [him]." Joint Appendix ("J.A.") 14 (emphasis added). Sorrell also submitted (and the trial court approved, although this time over Norfolk Southern's objection) Instruction No. 13 regarding contributory negligence, which conforms to MAI 32.07(B).[5] Tr. 573, 576-77; J.A. 11. This instruction provided, in relevant part, that the jury must find Sorrell contributorily negligent if his negligence "*directly contributed* to the cause of his injury," J.A. 15 (emphasis added). In contrast, the alternative, non-MAI instruction (Instruction No. A) that Norfolk Southern

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Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and

Second, [with respect to such conditions for work,] defendant either failed to provide:

reasonably safe conditions for work, or reasonably safe appliances, or reasonably safe methods of work, or reasonably adequate help, and

Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent, and

Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].

[5] MAI 32.07(B) states:

You must find plaintiff contributorily negligent if you believe:

First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

offered, but which the trial court refused to give, would have allowed the jury to find Sorrell contributorily negligent if his negligence "*contributed in whole or in part to cause his injury.*" J.A. 11 (emphasis added); *see also* Tr. 574-76.

Later that day, Norfolk Southern renewed its objection to the contributory negligence instruction, and the trial court again overruled it. Tr. 633.[6] After deliberations, the jury returned a verdict in favor of Sorrell, awarding him $1.5 million in damages. L.F. 6, 44.

Motion for New Trial. Norfolk Southern thereafter filed a motion for new trial, in which it renewed its contention that the trial court "erred in rejecting Defendant's Tendered Instruction A and giving Instruction 13, based upon MAI 32.07(B)." L.F. 76. Again, Norfolk Southern neither contested the negligence instruction nor argued that proximate cause was the appropriate standard for evaluating negligence or contributory negligence under the FELA. The trial court denied Norfolk Southern's motion. L.F. 189.

D. Missouri Court of Appeals.

On appeal to the Missouri Court of Appeals, Norfolk Southern argued the trial court had erred by giving the contributory negligence instruction because it:

> Misstates the FELA causation standard for contributory negligence in that it instructed the jury to find plaintiff negligent only if it

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[6] Norfolk Southern mentioned the negligence instruction while objecting that "there is no connection between any failure of Norfolk Southern to provide Mr. Sorrell with a reasonably safe place to work . . . as far as causing his injury." Tr. 633. Norfolk Southern, however, never objected to the form of the negligence instruction, and, in fact, it conceded that the record included sufficient evidence that Woodin's potentially negligent driving caused Sorrell's injury such that the question of liability had to be submitted to the jury. *Ibid.*

> concluded that his negligence 'directly contributed to cause his injury' rather than caused his injury 'in whole or in part.'

Appellant's Opening Brief ("Br.") 2, 26 (capitalization removed). To support its position, Norfolk Southern relied on this Court's decision in *Rogers*, which it characterized as holding that:

> the railroad employer could be held liable if its negligence played any role in producing the employee's injury, even if there were a number of other causes that may also have contributed to causing the injury.

Br. at 30. Norfolk Southern, conceding the point that it now contests, continued:

> In other words, *the traditional proximate cause test* – ordinarily submitted in MAI by language requiring the jury to find that 'as a direct result' of the defendant's negligence the plaintiff sustained damage, *see, e.g.*, MAI 17.01 – *is not appropriate in an FELA case.*

Br. at 30 (emphasis added).

In an unpublished memorandum opinion, the Missouri Court of Appeals affirmed the trial court's judgment. Petition Appendix ("Pet. App.") 21a. The Court of Appeals understood Norfolk Southern to contend that the contributory negligence instruction "*misstates the causation standard for contributory negligence in a FELA case* because" it is inconsistent with the "in whole or in part" language from MAI 24.01. *Id.* at 5a (emphasis added). The court held, however, that the Missouri Supreme Court had determined that MAI 32.07(B) – which the trial court followed – set forth the appropriate standard for contributory negligence in a FELA case. *Id.* at 7a.

Norfolk Southern next moved for rehearing and/or transfer to the Missouri Supreme Court. In its Motion for Rehearing, Norfolk Southern noted that in the trial court it had "objected to [the contributory negligence instruction] as contrary to the FELA," and it contended that if its:

> Instruction No. A had been given, the jury would have applied the same standard of causation to the plaintiff's negligence that it was instructed to apply to the defendant's negligence.

Motion for Rehearing at 2, 3.

Similarly, in its Motion to Transfer, Norfolk Southern stated, point blank, that "MAI 32.07(B) is simply wrong in applying the traditional proximate cause standard to comparative negligence in FELA case." Motion to Transfer at 10. Thus, two more times, Norfolk Southern indicated its preference for the Missouri Supreme Court's instruction regarding railroad negligence ("in whole or in part") over the proximate cause that is required to prove a plaintiff's contributory negligence, thus clearly approving the relaxed employer causation standard that it now seeks to challenge.

The Missouri Court of Appeals denied rehearing and transfer to the Missouri Supreme Court. Pet. App. 32a.

E. Missouri Supreme Court.

Norfolk Southern next filed an Application to Transfer, which is similar to a petition for certiorari, with the Missouri Supreme Court. In its application, which largely tracks the transfer motion filed with the Missouri Court of Appeals, Norfolk Southern, once again conceding the applicability of the relaxed standard for employer causation, argued that:

> MAI 32.07(B), the approved instruction for submitting contributory negligence in an FELA case, uses the traditional 'proxi-

> mate cause' standard of causation *rather than the more relaxed FELA standard of causation.*

Application for Transfer at 2 (emphasis added). Moreover, Norfolk Southern again cited this Court's decision in *Rogers* for the proposition that "*the traditional proximate cause test . . . is not appropriate in an FELA case.*" Application for Transfer at 5 (emphasis added).

The Missouri Supreme Court denied transfer in a summary order. Pet. App. 31a.

SUMMARY OF ARGUMENT

At every stage of this litigation, until its merits brief in this Court, Norfolk Southern disavowed proximate cause as the causation standard for railroad negligence. Instead, it embraced the lightened causation standard for employer negligence set forth in this Court's decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). By abandoning its prior interpretation of *Rogers*, as it now does, Norfolk Southern raises an issue it never raised in the state court or in its Petition for Certiorari. Norfolk Southern's failure to preserve this issue is more than a matter of waiver. It implicates jurisdictional and prudential considerations and compels dismissal of the writ.

Not only has Norfolk Southern failed to preserve this issue for this Court's consideration, but the interpretation of *Rogers* that Norfolk Southern advanced in the state court was correct – proximate causation does not apply to employer negligence. *Rogers'* conclusion that a lightened causation standard, rather than traditional proximate cause, applies to railroad negligence finds support in both the language and the beneficial purpose of the FELA.

Norfolk Southern obtained this Court's grant of certiorari on a different question – whether a lightened causation standard applies to plaintiff's contributory negligence. Norfolk

Southern has abandoned that claim. As matters now stand, for this Court to find in favor of Norfolk Southern based on its current interpretation of *Rogers* and the causation standard for defendant's negligence, the Court must find that the Missouri instruction on contributory negligence was appropriate, the only instruction Norfolk Southern challenged in the state court and in its Petition. In other words, Norfolk Southern now agrees that the Missouri courts committed no error on the only issue presented to them.

And, in fact, the Missouri courts made no such error. In enacting the FELA, Congress created a system that departs from the common law in order to shift liability for injuries from the workers to the railroad. Allowing a lightened causation standard for plaintiff's contributory negligence finds no support in the statute and would subvert Congress' goals.

Finally, under the facts of this case, Norfolk Southern could not have been prejudiced by the Missouri comparative negligence instruction as Sorrell's only potential negligence was in the manner he drove the truck before it fell off the road. If the jury found such driving to constitute negligence, that negligence would be a cause of his injuries under any standard.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED BECAUSE NORFOLK SOUTHERN NEVER ARGUED IN THE STATE COURTS BELOW, OR IN ITS PETITION FOR CERTIORARI, AS IT DOES HERE, THAT THE FELA REQUIRES A PLAINTIFF TO PROVE PROXIMATE CAUSATION.

Norfolk Southern contends in this Court, for the first time in this case, that the FELA requires a plaintiff to show that the railroad's negligence proximately caused his injuries. In the courts below, Norfolk Southern argued just the opposite,

wholeheartedly embracing the relaxed causation standard for railroad negligence but asking that the same relaxed causation standard be applied to plaintiff's contributory negligence. Norfolk Southern thus never gave the state courts below any opportunity to consider its current contention, made for the first time in the Brief of Petitioner, that proof of railroad negligence requires proximate causation. This default compels dismissal of the writ.

This Court has said time and time again that it "ordinarily 'do[es] not decide in the first instance issues not decided below.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (quoting *NCAA v. Smith*, 525 U.S. 459, 470 (1999)).[7] This reluctance to consider issues not presented to the lower court is particularly acute when the issue concerns a jury instruction to which the party did not object in the trial court. *See City of Springfield v. Kibbe*, 480 U.S. 257, 259-60 (1987) (per curiam). In such a case there exists "considerable prudential objection to reversing a judgment because of instructions that petitioner accepted." *Id.* at 259 (dismissing the writ).

In cases arising from the state courts, considerations of federalism and comity further compel the refusal to consider

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[7] *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (refusing to consider argument that maritime law governed where not raised in the lower courts); *Illinois v. McArthur*, 531 U.S. 326, 334-35 (2001) (refusing to consider argument that state lacked probable cause where respondent expressly conceded probable cause below); *United States v. Bestfoods*, 524 U.S. 51, 72 (1998) (refusing to "decid[e] in the first instance an issue on which the trial and appellate courts did not focus"); *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.") (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

issues not raised below. This Court has repeatedly declined to consider issues not advanced in the state courts from which a case arises, whether on the ground that such waiver deprives the Court of jurisdiction,[8] or because it creates a "weighty presumption against review," *see Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Illinois v. Gates*, 462 U.S. 213, 218 (1983).[9] Such decisions rest on respect for the state courts' institutional autonomy; this Court has deemed it "unseemly" to disturb the finality of state judgments on a ground that the state court did not have occasion to consider. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 90 (1997); *Webb*, 451 U.S. at 500.

This case falls squarely within these precedents. The Missouri courts at no time had any opportunity to consider Norfolk Southern's newly-minted claim that the FELA requires proof of proximate causation in order to establish a railroad's negligence. Accordingly, Norfolk Southern repeatedly and irreversibly waived its current claim, and the writ should be dismissed as improvidently granted.[10]

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[8] *See, e.g., Webb v. Webb*, 451 U.S. 493, 496-97, 501-02 (1981); *Congress of Indus. Org. v. McAdory*, 325 U.S. 472, 477 (1945); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940).

[9] This Court similarly lacks jurisdiction to review state-court judgments that rest on adequate and independent state grounds, even if the state ground is the appellant's failure to comply with state procedural rules. *See Wolfe v. North Ca.*, 364 U.S. 177, 196 (1960); *see also Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 463 (1936). The reason is simple: "if the same judgment would be rendered by the state court after [this Court] corrected its view of federal laws, [this Court's] review could amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126.

[10] As recently as last Term, this Court dismissed a petition as improvidently granted where, as the respondent there explained, the

First, at trial, Norfolk Southern declined to object to the railroad negligence instruction as required under state law, even though the instruction employed the FELA's "in whole or in part" language, which the Missouri courts have interpreted as not requiring proof of proximate causation. *See* Tr. 571-78; *Wilmoth v. Chicago, Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972). Indeed, Norfolk Southern urged the trial court to use that very instruction as the model for instructing the jury on contributory negligence, faulting the trial court for *applying* a proximate causation requirement to the contributory negligence defense, not the other way around. *See* J.A. 11 (court refused to give contributory negligence instruction that used the language "in whole or in part"); *see also* Tr. 574-76; L.F. 76. Thus this case presents more than a waiver. It involves an affirmative argument in the court below that the standard Norfolk Southern now challenges was the appropriate standard to use. As the instruction on defendant's negligence was the only way in which the issue Norfolk Southern now presents could have had any impact on the jury's verdict, Norfolk Southern's failure to raise a "specific objection" to the instruction that stated "distinctly the matter objected to and the grounds of the objection" forever waived any claim it might now have with respect to the appropriate causation standard for railroad negligence. *See* Mo. Sup. Ct. R. 70.03; *see also Cook v. Caldwell Banker*, 967 S.W.2d 654, 658 (Mo. Ct. App. 1998) (refusing to review alleged instructional error where contention on appeal differed from objection made at trial).

Second, Norfolk Southern compounded that waiver in the trial court by failing to include in its motion for new trial any

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"opening brief all but abandon[ed]" the question on which the petitioner had obtained certiorari and instead asserted an issue that petitioner "had affirmatively conceded . . . in the lower courts." Brief of Respondent at 12, *Mohawk Indus. Inc. v. Williams*, 126 S. Ct. 2016 (2006) (No. 05-465).

challenge to the defendant's negligence instruction. *See* Mo. Sup. Ct. R. 70.03; *Hertz v. Raks Hospitality, Inc.*, 196 S.W.3d 536, 546 (Mo. Ct. App. 2006) (claim of instructional error not preserved when not reasserted in motion for new trial).

Third, in the Missouri Court of Appeals, Norfolk Southern continued to object only to the contributory negligence instruction, accepting the failure to require proximate cause in the railroad negligence instruction and going so far as to state expressly that "*the traditional proximate cause test . . . is not appropriate in an FELA case.*" Br. at 30 (emphasis added). Under Missouri's procedural rules, Norfolk Southern's failure to object to the negligence instruction or advocate a proximate cause standard in its appellate brief constituted an additional irreversible abandonment of those arguments. *See* Mo. Sup. Ct. R. 84.04(e) (limiting appellate review to errors included in "Points Relied On"); *Eagle v. Redmond*, 80 S.W.3d 920, 923-27 (Mo. Ct. App. 2002) (noting that even if an argument is raised in the Points Relied On, a party waives the argument by not advancing it in the text of the brief).

Fourth, in its motion for rehearing before the Court of Appeals, Norfolk Southern again neither voiced objection to the negligence instruction nor argued that proximate causation was the appropriate standard for the FELA cases. Moreover, again it affirmatively argued that the causation standard for railroad negligence is a lesser one. *See* Motion for Rehearing 2-3 (restating an objection to the *contributory* negligence instruction as "contrary to the FELA" because its causation standard was *higher* than that required for railroad negligence).

Finally, in seeking transfer to the Missouri Supreme Court, Norfolk Southern again held fast to its position that only the contributory negligence instruction, not the railroad negligence instruction, was incorrect, telling the court that

"MAI 32.07(B) is simply wrong in applying the traditional proximate cause standard to comparative negligence in FELA cases." *See* Motion to Transfer at 10; Application for Transfer at 2 (contending that the trial court's contributory negligence instruction misstates the FELA causation standard because it "uses the traditional 'proximate cause' standard of causation *rather than the more relaxed FELA standard of causation*") (emphasis added). Indeed, under Missouri law, Norfolk Southern could not have changed its position at this stage even if it had wanted to. *See* Mo. Sup. Ct. R. 83.08(b) (prohibiting parties from altering "the basis of any claim that was raised in the court of appeals brief").

Norfolk Southern did not present its current issue in the Petition for Certiorari, either. Consistent with its focus in the state courts on relaxing the causation standard for plaintiff's contributory negligence, Norfolk Southern's question presented in the Petition asked "[w]hether the court below erred in determining . . . that the causation standard for employee *contributory negligence* under the Federal Employers Liability Act ('FELA') differs from the causation standard for railroad *negligence*." Pet. i. In its brief, however, Norfolk Southern flips the order of clauses in the question presented to reflect its new focus on escalating the causation standard for the railroad's negligence, now rephrasing the question presented as "[w]hether the court below erred in determining that the causation standard for railroad *negligence* under the Federal Employers Liability Act ('FELA') differs from the causation standard for employee *contributory negligence*." Br. of Pet'r at i.

Norfolk Southern's emphasis in the petition, and throughout this case in the Missouri courts, on changing the contributory negligence standard, rather than the employer's negligence standard, is also apparent from its invocation of a "conflict" among multiple courts of appeal as a reason justifying this Court's review. As proof of this contention, Norfolk Southern cited cases concluding that plaintiff's causation

standard should mirror *the lightened causation standard* applicable to defendant's negligence.[11]

Norfolk Southern now suddenly has changed its tune. It no longer faults the trial court for instructing the jury to find proximate causation in connection with Sorrell's alleged contributory negligence. Instead, it faults the trial court for failing to require proof of proximate causation in connection with Sorrell's negligence claim against the railroad. Disavowing the relaxed standard of causation it repeatedly and consistently advocated below, Norfolk Southern now argues for the first time that the FELA's causation requirement "is an elaboration of the common-law rule of proximate causation." Br. of Pet'r at 26. Its central argument to this Court is that a FELA "plaintiff must prove that negligence was the proximate cause in whole or in part of the employee's injury." *Id.* at 27 (internal quotation marks omitted); *see also id.* at 26 (arguing that the FELA is "an elaboration of the common-law rule of proximate causation"); *id.* at 50 (arguing that it is entitled to a new trial in which the court instructs the jury "that both defendant negligence and plaintiff contributory negligence are measured by the same causal yardstick – proximate cause.").

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[11] In Norfolk Southern's reply to the petition for certiorari, it claimed that determining the proper causation standard for defendant's negligence is "'predicate to intelligent resolution' of whether the standards for plaintiff and defendant negligence are the same." Br. of Pet'r at 7. But Norfolk Southern had no difficulty in the state court, separately and solely challenging the causation standard for plaintiff's contributory negligence, offering as justification for that position that the standard for contributory negligence and negligence should be the same. Likewise, in its merits brief, Norfolk Southern has solely and separately challenged the causation standard for defendant's negligence. Norfolk Southern's actions prove that the two questions – the proper causation standard for defendant's negligence and plaintiff's contributory negligence – are not inextricably intertwined.

Norfolk Southern has even changed its reading of this Court's opinion in *Rogers*, the critical case governing the issues in this appeal, *see infra* Part II. Below, Norfolk Southern argued that this Court's decision in *Rogers* stands for the proposition that "the traditional proximate cause test . . . is *not* appropriate in a FELA case." Application for Transfer at 5 (emphasis added); *see also* Br. at 30 (describing *Rogers* as rejecting the "traditional proximate cause test"). Now, Norfolk Southern reads *Rogers* to mean the exact opposite, contending that *Rogers* "reaffirms the traditional proximate-causation standard under FELA . . . ." Br. of Pet'r at 38.

Accordingly, Sorrell cannot be faulted for not pointing out in his Brief in Opposition Norfolk Southern's obvious waiver of this question in the state courts below. The Petition failed to put him on notice that he had any need to do so. Only a single sentence in the Petition even so much as alludes to any possible argument that the FELA requires proof of proximate cause for railroad negligence. *See* Pet. 14-15 ("The predicate rule in Missouri that FELA eliminates the proximate cause requirement for railroad negligence is contrary to federal law . . . but at a minimum this Court should not allow a substantial and unjustified circuit conflict to persist.") Respondent cannot fairly be expected to have extrapolated from such a passing side remark that Norfolk Southern would completely reverse course in this Court from the position it repeatedly and consistently took below. As this Court has made clear, "[i]t would be unreasonable to require a respondent on pain of waiver to object at the certiorari stage . . . to the petitioner's . . . failure to preserve any questions fairly included within the questions presented but uncontested earlier." *Kibbe*, 480 U.S. at 260.[12]

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[12] In any event, under Rule 15.2, this Court retains discretion to entertain objections that a respondent does not raise in a brief in opposition. This Court should consider whether Norfolk Southern has properly raised its objection to the trial court's negligence

Norfolk Southern has wholly abandoned the question that it repeatedly presented to the Missouri courts – whether the plaintiff's contributory negligence in a FELA case should be subject to the relaxed standard of causation that is applied to a railroad's negligence. In its place, Norfolk Southern now argues for the first time that a uniform proximate causation standard should apply to both railroad negligence and employee contributory negligence. Since Norfolk Southern not only failed to present this argument to the courts below, and indeed has flipped its argument and taken a wholly inconsistent position, this Court should dismiss the writ as improvidently granted.

II. THE FELA REQUIRES A RELAXED CAUSATION STANDARD FOR RAILROAD NEGLIGENCE, NOT PROXIMATE CAUSE AS NORFOLK SOUTHERN INCORRECTLY ASSERTS.

If this Court reaches the merits of Norfolk Southern's claim that the railroad negligence instruction is inconsistent with the FELA, it should affirm. In the first place, it is difficult to see how the trial court could have erred in giving the jury an instruction that exactly mirrors the language of the statute. *Compare* J.A. 14 *with* 45 U.S.C. § 51.[13]

Even more important, in *Rogers*, this Court squarely held that the FELA has a relaxed standard of causation for railroad negligence. Rejecting an earlier Missouri Supreme Court decision requiring that a FELA plaintiff demonstrate that a

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instruction as a "'predicate to an intelligent resolution' of the question presented." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (quoting Rule 14.1(a)). Clearly, Norfolk Southern has not done so.

[13] As this Court has observed, the language of this portion of the FELA is "simple and direct." *Coray v. Southern Pac. Co.*, 335 U.S. 520, 524 (1949); *see also Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 607 (10th Cir. 1997) (upholding jury instruction tracking the language of the FELA).

railroad's negligence proximately caused his injury, the Court construed the FELA to require only a relaxed standard of causation. In the nearly 50 years since *Rogers*, all eleven circuits that have applied *Rogers* have recognized that it rejected the proximate cause requirement for railroad negligence in the FELA cases in favor of a more relaxed causation standard. Congress has not seen fit to amend the Act to overrule or modify that interpretation. Principles of *stare decisis* therefore suggest that this Court should not lightly reconsider such a well-established precedent.

Norfolk Southern tries to explain away *Rogers* as a case that speaks only to issues of multiple causation. *See* Br. of Pet'r at 30-36. This interpretation, however, is inconsistent with its own position in the Missouri courts, *see supra* 9-11, and in this Court just four terms ago in the most recent FELA case to be decided by this Court.[14] Equally important, Norfolk Southern's most recent interpretation of *Rogers* is inconsistent with the FELA's history, at odds with this Court's decisions, and contradicted by the uniform understanding of the eleven circuits that have applied *Rogers*. Any such radical departure from precedent as Norfolk Southern suggests can properly be directed only to Congress.

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[14] *See* Brief of Petitioner at ii, *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) (No. 01-963) ("Petitioner Norfolk & Western Railway Company no longer exists as a separate entity and has been merged into the Norfolk Southern Railway Company, . . ."), 45 (the FELA "permit[s] plaintiffs to establish liability under a reduced standard of causation, *Rogers*."), 46 ("FELA's reduced causation standard"), 47 ("As discussed above, a FELA plaintiff can often recover from a railroad under the reduced causation requirement set forth in *Rogers*.").

A. Congress Lowered The Causation Standard for Railroad Negligence In Order To Serve The FELA's Purpose Of Facilitating Worker Recovery.

Recognizing that the common law was not providing adequate compensation for railroad worker injuries, Congress, in enacting the FELA, decided to "shif[t] part of the 'human overhead' of doing business from employees to their employers." *Gottshall*, 512 U.S. at 542 (quoting *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 58 (1943)); *see also* S. Rep. No. 60-460, at 2 (1908) (explaining that the FELA was designed "to allow the burden of accident and misfortune to fall, not upon a single helpless family, but upon the business in which the workman is engaged; that is upon the whole community" and therefore "to effect this reasonable reformation of [the] industrial code"). It designed the statute "to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.'" *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (quoting H.R. Rep. No. 60-1386 at 2 (1908)). Thus, this Court has recognized generally that the FELA is a broad remedial statute, and has adopted a "standard of liberal construction in order to accomplish [Congress'] objects." *Urie*, 337 U.S. at 180; *see also Gottshall*, 512 U.S. at 543.

Although Congress stopped short of imposing automatic liability on employers as workers' compensation laws do, it nevertheless used those laws, then prevalent in Europe, as a standard. *See* 42 Cong. Rec. 4527, 4536 (1908). Consequently, Congress deliberately relaxed many of the demanding requirements of the common law of negligence. *See, e.g., Gottshall*, 512 U.S. at 542-43; 45 U.S.C. §§ 51-55. This

relaxation reflected Congress' intention that the jury should be the primary mechanism for ensuring compensation for injured workers in its hybrid system. As explained in *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350 (1943), the right to trial by jury:

> is part and parcel of the remedy afforded railroad workers under [the FELA]. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries.

Id. at 354. "[T]o deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Id.*

Indeed, Congress amended the FELA in 1939 to ensure that this goal of expanding compensation for workers was not thwarted by judicial introduction of common law concepts into the statute. *See Rogers*, 352 U.S. at 508-09.[15] It also expressly declined a revision to the FELA that would have equated the "in whole or in part" language of section 1 with proximate cause.[16]

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[15] This intent to clarify that FELA departs from the common law undermines any reliance upon the FELA decisions predating the 1939 amendments. *See* Br. of Pet'r at 27-29, 38-39. Although Norfolk Southern also cites some decisions after 1939, none of these cases actually strikes down a claim based upon the submission of tenuous causation evidence. Moreover, while some of these cases refer to proximate cause, as the Seventh Circuit recognized, *see infra* 35, the standard applied under the FELA was actually below the traditional proximate cause requirement.

[16] *Compare* 42 Cong. Rec. 10,710 (1939) (proposed amendment in 1939: "In any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his

This Court furthers Congress' apparent and undisputed remedial goals for enacting the FELA by interpreting the language – "in whole or in part" – as imposing a lightened causation standard, not a proximate cause standard, for the railroad's negligence.[17] As the Senate Report accompanying the 1908 Act put it, Congress intended the railroad to be responsible for "the loss which arises from an accident which befalls one of [its employees]." S. Rep. No. 60-460, at 3 (1908). To interpret the FELA as requiring strict adherence to traditional proximate cause would be inconsistent with the "humanitarian purposes" at the FELA's core, as it would push railroad workers closer to the traditional common law scheme that Congress was seeking to avoid. *See Gottshall*, 512 U.S. at 542-43.

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employment in any case where . . . the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death of such employees.") (emphasis added) *and* H.R. Rep. No. 75-2153, at 1 (1938) (similar proposed amendment in 1938) *with* 45 U.S.C. § 54 ("In any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his employment in any case where such injury or death *resulted in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier . . .") (emphasis added). Norfolk Southern takes from this rejection that the "plain inference is that the term ['proximately'] was unnecessary." Br. of Pet'r at 34. However, a more plausible inference is that in rejecting the proximate cause standard in section 4 when characterizing the railroad's liability for its negligence, Congress likewise did not intend to incorporate proximate cause into section 1 regarding that same liability.

[17] Norfolk Southern suggests that in 1908, the courts universally interpreted the phrase "in whole or in part" as referring to instances of multiple causation, but the cases it cites neither interpret that language in a statutory context nor consider whether the phrase bears on the applicable causation standard. Br. of Pet'r at 29-31.

B. In *Rogers*, This Court Held That The FELA Does Not Require Proof Of Proximate Causation For Railroad Liability.

In *Rogers v. Missouri Pacific Railroad Co.*, 284 S.W.2d 467 (Mo. 1955) (also a state court case tried in Missouri), plaintiff James Rogers sued under the FELA to recover for the injuries that he sustained after falling into a drainage culvert while burning weeds on the defendant's right of way. Rogers alleged that his employment for defendant required that he use a hand torch to burn weeds in close proximity to the defendant's tracks. *Id.* at 468. While doing so, the wind from a passing train caused the fire to come dangerously close to him, such that he retreated quickly for fear of being engulfed in flames. *Ibid.* He came across an area of loose and sloping gravel that did not provide him sufficient footing, and he fell into the culvert. *Ibid.* Rogers' FELA suit alleged that defendant had failed to exercise ordinary care and had provided him with a dangerous method and place of work. *Ibid.* The railroad moved for a directed verdict, contending, *inter alia*, that "there was no evidence that plaintiff's alleged injury was proximately caused by the method adopted by the defendant in burning the weeds." *Id.* at 470. The trial court overruled the motion, and the jury found in favor of Rogers. *Id.* at 468, 470.

Agreeing with the railroad that the trial court erred in overruling the motion for directed verdict, the Missouri Supreme Court held that for the railroad's negligence to be actionable under the FELA, "there must not only be a causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury." *Id.* at 471. Applying that standard to the facts of the case, the court reversed the jury's verdict in favor of Rogers because it concluded that there was insufficient evidence that the railroad's negligence proximately caused Rogers' injury in light of Rogers' intervening action in retreating from the flames. *Id.* at 472.

After granting certiorari "to prevent [FELA's] erosion by narrow and niggardly construction," *Rogers*, 352 U.S. at 509, this Court reversed, chastising the Missouri Supreme Court for "fail[ing] to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action." *Id.* at 509-10. This Court explained that the Missouri Supreme Court had used the "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* at 506. This Court continued, however, holding that the proximate cause standard was inapplicable in a FELA case:

> Under [the FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence *played any part, even the slightest, in producing the injury or death* for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.

Id.

In so holding, the Court sought to vindicate "the basic congressional intention to leave to the fact-finding function of the jury the decision of . . . whether employer fault *played any part in the employee's mishap*." *Id.* at 509 (emphasis added). Thus, this Court understood that "the inquiry in [FELA] cases . . . rarely presents more than the single question *whether negligence of the employer played any part, however small, in the injury or death* which is the subject of the suit," *Id.* at 508 (emphasis added).

It is therefore apparent that, in *Rogers*, this Court resolved the issue of whether the FELA requires proof of

proximate causation for a railroad to be liable, definitively holding that it does not.

C. The Holding In *Rogers* Is Well-Established.

1. *This Court Has Repeatedly Reaffirmed That The FELA Does Not Require Proof of Proximate Causation for Railroad Liability.*

Tellingly, Norfolk Southern does not point to one post-*Rogers* decision where this Court has stated that proximate cause is the standard for railroad liability under the FELA. Indeed, after *Rogers*, this Court has repeatedly recognized that a FELA plaintiff need not demonstrate that a railroad's negligence proximately caused his injury. For example, in *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164 (1969), this Court explained that, unlike common law tort actions that are governed by state law, a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's" negligence. *Id.* at 166 (quoting 45 U.S.C. § 51). Similarly, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court provided *Rogers* as an example of its liberal construction of the FELA, stating that the Court had "held . . . that a relaxed standard of causation applies under FELA." *Id.* at 543; *see also Ayers*, 538 U.S. at 161-62 (reiterating that it is "'irrelevant' . . . 'whether the immediate reason' for an employee's injury was the proven negligence of the defendant railroad or 'some cause not identified from the evidence'") (quoting *Rogers*, 352 U.S. at 503).

Moreover, since *Rogers*, this Court has applied a relaxed causation standard to railway negligence in the FELA cases on numerous occasions. For instance, in *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), this Court reversed a state appellate court's decision to enter judgment – contrary to a jury verdict – for the railroad, where the employee had to have both of his legs amputated after being bitten by an insect while working around a stagnant pool of

water of which the railroad had been aware. *Id.* at 109. Although the state appellate court had held that there was a break in the causal chain that turned it into a mere "series of guesses and speculations," this Court disagreed, holding that there was enough evidence "to justify a jury's determination that employer negligence had played *any role* in producing the harm," which was all the statute required. *Id.* at 112, 116 (emphasis added).[18]

Similarly, in *Dennis v. Denver & Rio Grande W. R.R. Co.*, 375 U.S. 208 (1963) (per curiam), this Court reinstated a jury verdict for plaintiff despite the fact that there was sufficient evidence to conclude that the plaintiff's own contributory negligence was the sole cause of his frostbite. *Id.* at 210. Relying on *Rogers*, this Court said, "Once it is shown that 'employer negligence played any part, even the slightest, in producing the injury,' a jury verdict for the employee may not be upset on the basis of his own negligence, no matter how substantial it may have been . . . ." *Ibid.* (quoting *Rogers*, 352 U.S. at 506); *see also Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140 (1959) (affirming reversal of judgment in favor of railroad crossing watchman who was hit by intoxicated driver while on duty flagging traffic for a passing train because "the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played *no part* in petitioner's injury") (emphasis added).

Norfolk Southern contends that this Court in *Kernan v. American Dredging Co.*, 355 U.S. 426, 434 (1958) indirectly affirmed proximate cause as the appropriate standard for railroad negligence. Br. of Pet'r at 41 n.20. But *Kernan* did not concern causation at all and instead addressed whether the

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[18] Eight Justices agreed that the lower court had improperly reversed the judgment based on causation. *See Gallick*, 372 U.S. at 114-17; *Id.* at 126 (Stewart , J., dissenting).

Jones Act imposes liability for violation of a statutory duty when the injury is not one that the statute was designed to prevent. *Id.* at 432-33. The only direct statements in that decision concerning causation echo the language of *Rogers* and the FELA: "[T]he theory of the FELA is that where the employer's conduct falls short of the high standard required of him by this Act, and his fault, in whole or in part, causes injury, liability ensues." *Id.* at 438-39.

Thus, this Court has repeatedly interpreted *Rogers* to hold that proof of proximate causation is not required for railroad liability, and, it has embraced and applied that holding on numerous occasions.

2. *The Courts of Appeals Have Uniformly Recognized That The FELA Does Not Require Proof of Proximate Causation for Railroad Liability.*

In its Petition for Certiorari, Norfolk Southern conjured before this Court a circuit conflict on the issue of whether the causation standard for plaintiff's contributory negligence is the same as the lightened causation standard for defendant's negligence. Pet. 13-15. But there is no circuit conflict at all on the only relevant issue Norfolk Southern now argues, namely, whether railroad negligence under the FELA requires a showing of proximate causation. To the contrary, on this new issue, there is circuit unanimity that it does not.

Of the eleven circuits that have addressed the issue, all eleven have understood *Rogers* and its progeny to stand for the proposition that railroad negligence under the FELA is subject to a more relaxed causation standard than would be required in a traditional common law negligence action. For example, the Fourth Circuit has recognized that "to further the remedial goals of the FELA . . . the Supreme Court has relaxed the standard of causation by imposing employer liability whenever 'employer negligence played any part, even the slightest, in producing the injury or death for which dam-

ages are sought.'" *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999) (quoting *Gottshall*, 512 U.S. at 543). The Tenth Circuit has understood this Court in *Rogers* to have "definitively abandoned" any reliance on the language of proximate causation to analyze the FELA liability. *See Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606-07 (10th Cir. 1997). Moreover, relying on *Rogers*, the Seventh Circuit has recently stated that a plaintiff's "lighter burden of proof" in the FELA cases permits him to "more easily survive a motion for summary judgment." *Holbrook v. Norfolk S. Ry. Co.*, 414 F.3d 739, 741-42 (7th Cir. 2005).

Such statements by the Fourth, Seventh, and Tenth Circuits are representative of the other circuits' assessments of the FELA requirements for railroad negligence. *See, e.g.*, *Napier v. F/V DEESIE, Inc.*, 454 F.3d 61, 67 (1st Cir. 2006) (to satisfy his "burden to prove causation," plaintiff "need only demonstrate that [the defendant's] 'negligence played any part, even the slightest, in producing the injuries for which the plaintiff seeks damages'"); *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999) ("a relaxed standard applies in FELA cases"); *Syverson v. Consol. Rail Corp.*, 19 F.3d 824, 826 (2d Cir. 1994) ("the standard of fault springs from statute as opposed to common-law analysis"); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267-68 (3d Cir. 1991) ("concept of causation under FELA is also broadly interpreted" such that "injury need not be an immediate result of an accident"); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc) (*Rogers* "used the term 'slightest' to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA" cases); *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 433-34 (6th Cir. 2003) (*Rogers* "adopted this relaxed standard in order to effectuate Congress' intent when it amended FELA in 1939 'to preserve the plaintiff's right to a jury trial'"); *Fletcher v. Union Pac. R.R. Co.*, 621 F.2d 902,

909 (8th Cir. 1980) ("test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury"); *Oglesby v. S. Pac. Transp. Co.*, 6 F.3d 603, 606-09 (9th Cir. 1993) ("the standard of causation required under the FELA differs from common-law proximate causation"); *Little v. Nat'l R.R. Passenger Corp.*, 865 F.2d 1329 (Table), 1988 WL 145095, 1 (D.C. Cir. 1988) ("the distinguishing feature of FELA cases [is] that [the plaintiff] need not prove the [defendant's] negligence was the proximate cause of its injury, only that it played a part"); *Fare v. S. Ry. Co.*, 438 F2d 933, 934 (11th Cir. 1971) (following the principle that "the plaintiff's burden of proof in an FELA case is 'much less than the burden required to sustain recovery in ordinary negligence actions.'")

Amicus curiae, Association of American Railroads (AAR), cites a handful of state cases that it contends apply the traditional common-law causation standard to railroad liability, but the existence of such an extreme minority of dissenting views does not justify a departure from the otherwise overwhelmingly uniform interpretation of *Rogers* that state and federal courts have given it. *See* AAR Amicus Br. at 9-10. Moreover, any mention of the proper causation standard in those cases was dicta, as the proper causation standard for railroad negligence was not at issue in any of them. *See id.*

D. *Rogers* Was Not Merely Concerned With Comparative Negligence.

In an effort to reduce railroads' responsibility for injuries to their employees in this inherently dangerous industry, Norfolk Southern now proposes that *Rogers* speaks only to issues of multiple causation. Contrary to Norfolk Southern's contention, this Court was squarely focused on the causation requirements for railroad negligence and the causation standard that the plaintiff must demonstrate to get to the jury in an FELA case.

Indeed, contrary to Norfolk Southern's contention, the issue of proximate causation was a critical issue that was briefed by both parties in *Rogers*. In fact, the purported basis for the railroad's motion for a directed verdict (a motion the trial court denied, prompting the Missouri Supreme Court to reverse) was the absence of proximate cause. *See Rogers*, 284 S.W.2d at 470. Rogers' brief in this Court expressly argued the contrary: "Certainly there should be no question as to the causal relationship between respondent's negligence and petitioner's injury in view of the broadened concept of 'proximate cause' under the Federal Employers' Liability Act." Brief of Petitioner at 24, *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957) (No. 56-28).

Rogers also relied on authority suggesting that a railroad would be liable if its negligence was "among [the] causes" of injury to the employee even if some other factor was "logically nearer to, or more influential in producing that injury." *Id.*, at 24-25. Rogers' brief spent considerable space elaborating that the FELA has displaced "the old concept of proximate cause," and read the "in whole or in part" language of the statute in particular to have been the source of this change in the common law: "Now, if the negligence of the railroad has 'casual' [sic] relation' – if the injury or death resulted '*in part*' from defendant's negligence, there is liability." *Id.* at 25.

While the railroad's brief in *Rogers* did not address proximate causation in any detail, focusing instead on argument that the railroad had violated no duty of care, the Respondent devoted most of its Petition for Rehearing to arguing, unsuccessfully, that the Court's opinion in *Rogers* "in effect discards the entire theory of proximate cause. The Court now says that if the employer's negligence played *any part, even the slightest*, in producing the injury, there is liability." Pet. for Reh'g at 4, *Rogers*, 352 U.S. 500. The railroad argued to no avail that the common law concept of proximate cause should "remain unchanged" by avoiding

"placing overemphasis upon the 'in whole or in part' portion of the statute." *Id.* at 5.

After considering these arguments, this Court could not have been more clear that it was expressly repudiating the Missouri Supreme Court's invocation of the "language of proximate causation" for railroad negligence. *Rogers*, 352 U.S. at 506. The decision's central passage speaks for itself:

> Under [the FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence *played any part, even the slightest, in producing the injury or death* for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that *negligence of the employer played any part at all in the injury or death*. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence.

Id. at 506-07.

Although *Rogers* certainly addressed the role of plaintiff's contributory negligence, it did so only in the broader context of what evidence was necessary to present a jury question on whether a defendant's negligence caused plaintiff's injury. Thus, this Court broadly held that "the Congress vested the power of decision in [FELA] actions exclusively in the jury in all but the infrequent cases where

fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Id.* at 510 (emphasis added). This possibility is not hypothetical. *See Inman, supra.* Any suggestion that only comparative negligence was at issue in *Rogers* is quite simply, wrong.

E. *Rogers* Is Consistent With The FELA Decisions That Came Before It.

Norfolk Southern also seeks to evade *Rogers* by portraying this Court's pre-*Rogers* FELA jurisprudence as uniformly applying traditional notions of proximate causation, such that there would be no reason to interpret *Rogers* as departing from that mold. The fact that pre-*Rogers* decisions use the term "proximate cause" in FELA cases provides no insight into the meaning of that term, because not until *Rogers* was this Court given the opportunity to address the appropriate causation standard for railroad negligence. In all of the earlier decisions, the Court's use of that term was not essential to its decision. Moreover, when the Court referenced proximate cause in its pre-*Rogers* decisions, it did not give the term the standard meaning that it has now come to enjoy.

For example, *Rogers* cites *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949), which suggested an FELA plaintiff must show that the railroad's negligence was the proximate cause of his injuries, for the proposition that railroad negligence need only have "played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 523; *Rogers*, 352 U.S. at 506 & n.11. In *Coray*, this Court reversed a judgment in favor of a railroad, despite the tenuous causal connection between the railroad's negligence and the employee's injury, a connection that the state supreme court described as merely philosophical and not substantial. *Coray*, 335 U.S. at 523. There, the evidence showed that the motor truck car that the employee was operating crashed into a train that it had been following (at a similar rate of speed) because the first train suddenly stopped due

to defective brakes and the deceased did not see the stopped train, as he was looking in another direction. *Id.* at 521. This Court explained that the FELA "declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from" the railroads' negligence, and therefore it "has commanded that if a breach of [its duty of care] contributes in part to an employee's death, the railroad must pay damages." *Id.* at 524; *see also Schulz v. Pa. R.R. Co.*, 350 U.S. 523, 526 (1956) (reversing directed verdict for employer in Jones Act claim, which incorporates the FELA, because "[f]act finding does not require mathematical certainty" and that the railroad was liable if its employee's death "resulted 'in whole or in part' from [its] negligence.").

Indeed, the Seventh Circuit understood this Court's use of the term "proximate cause" in the early FELA cases to deviate from the traditional definition of the term. As that court explained:

> Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident . . . in cases where [the FELA] applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence 'in part' results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,' – if the injury or death resulted 'in part' from defendants' negligence, there is liability. The words 'in part' have

> enlarged the field or scope of proximate causes in these railroad injury cases.

Eglsaer v. Scandrett, 151 F.2d 562, 565-66 (7th Cir. 1945); *see also O'Day v. Chicago River & Ind. R.R. Co.*, 216 F.2d 79, 83 (7th Cir. 1954). The Second Circuit likewise understood early on that proximate causation "in cases where the liability depends upon a failure of foresight" by the railroad should be further refined, such that a railroad would be liable where "the chain of events which resulted in plaintiff's injuries were [sic] not . . . beyond calculable foresight." *Cusson v. Canadian Pacific Ry. Co.*, 115 F.2d 430, 432 (2d Cir. 1940) (Hand, J.).

Thus, long before *Rogers*, this Court, as well as lower courts, had already recognized that the traditional understanding of proximate causation was inconsistent with the FELA's negligence scheme.

F. Norfolk Southern's Policy Arguments Do Not Justify Judicially Overruling *Rogers* in Violation of *Stare Decisis*.

Norfolk Southern spends much of its brief arguing that, for policy-related reasons, the FELA is best interpreted to incorporate the traditional proximate causation requirement. These arguments are not only incorrect, but also ignore the impact of the *Rogers* decision. Because it has been established for nearly half a century that the FELA has a relaxed causation standard, the Court is not free to reject that standard based upon its views of its wisdom. To the contrary, the doctrine of *stare decisis* requires that such decisions be made by Congress alone.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006) (internal quotations omitted). For

these reasons, "the rule of law demands that adhering to [this Court's] prior case law be the norm." *Id.* As Norfolk Southern recognizes, Br. of Pet'r at 40, considerations of *stare decisis* weigh particularly heavily "in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *accord Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 202 (1991).

This Court has applied the principle of *stare decisis* in the specific context of the FELA, recognizing "that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'" *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979)). In *Morgan*, lower courts had with "virtual unanimity over more than seven decades" ruled that the FELA did not provide for prejudgment interest. 486 U.S. at 338. Although this Court had not addressed the issue, it nevertheless refused "in the face of such congressional inaction to alter the longstanding apportionment between carrier and worker of the costs of railroading injuries." *Id.* at 339. It would be equally inappropriate here to retreat from a statutory interpretation this Court and the courts of appeals have embraced for the past 50 years without modification by Congress. *See, e.g., Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir. 1974) ("We will not assume that Congress is unaware of the judicial gloss that the Act has received. If the Act as it has been interpreted and applied does not correctly reflects what was intended by the legislative branch then the change must be made there.").

Norfolk Southern offers numerous supposed policy considerations – the proverbial parade of horribles – in favor of rejecting FELA's lightened causation standard for railroad negligence, but none are persuasive even if the Court were to seek to legislate where Congress has not. Remarkably, Nor-

folk Southern contends that using the lightened causation standard that has been in place for at least 50 years will lead to "dramatic and unwarranted expansion of railroad liability, and . . . absurd results." Br. of Pet'r at 44. If that were truly the case, the flood gates would have opened long ago, as the courts have successfully tried thousands of cases under that standard for nearly 50 years without significant incident. Indeed, the only way in which this Court's decision here could create a dramatic change in railroad liability would be if it abandoned the nearly uniform, half-century interpretation of the FELA as allowing railroad liability on a showing of less than proximate cause.

Norfolk Southern also argues incorrectly that the relaxed standard of causation for railroad negligence has led to excessive and effectively limitless liability for railroads. This has been the standard response of the railroads to every departure the FELA made from the harshness of the common law, and it is equally unavailing here. Railroads routinely prevail in the FELA cases, where appropriate.[19]

Even the cases that Norfolk Southern offers as examples of allegedly outrageous instances of liability come squarely within Congress' intended interpretation of the FELA. *Parker v. Atchison, Topeka & Santa Fe Railway*, 263 Cal.

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[19] *See, e.g., Clark v. Mo. & N. Ark. R.R. Co., Inc.*, 157 S.W.3d 665 (Mo. Ct. App. 2004) (affirming jury verdict in favor of railroad); *Travis v. Kansas City S. Ry. Co.*, 977 S.W.2d 512 (Mo. Ct. App. 1998) (affirming judgment not withstanding the verdict in favor of railroad); *Messick v. Atchison, Topeka & Santa Fe Ry. Co.*, 924 S.W.2d 620 (Mo. Ct. App. 1996) (affirming jury verdict in favor of railroad); *York v. Missouri Pacific R. Co.*, 813 S.W.2d 61 (Mo. Ct. App. 1991) (same); *Turner v. Norfolk & Western Ry. Co.*, 785 S.W.2d 569 (Mo. Ct. App. 1990) (same); *Eickelman v. Illinois Cent. Gulf R. Co.*, 714 S.W.2d 611 (Mo. Ct. App. 1986) (same)

App. 2d 675 (Cal. Ct. App. 1968), for example, cited by Norfolk Southern as an example of runaway liability, involved a worker who sustained injuries when he fell twice in the railroad yard due to ruts and accumulated oil. *Id.* Permitting liability in that case was consistent with Congress' express intention that the failure to maintain the railroad yard is actionable negligence. *See* S. Rep. No. 84-661, at 4 (1939) (the railroad "may be negligent in allowing his road, or his yard, to become littered with debris"). Likewise, in *Peters v. CSX Transp., Inc.*, No. 04-CV-077, 2006 WL 42179 (W.D. Ky. Jan. 3, 2006), another case cited by Norfolk Southern as an outrageous decision, the employee claimed that the railroad's negligence was a causal contribution to his injury, even though third parties may have also contributed. *Id.* at *2 (alleging railroad negligently failed to place warning signs in advance of the barricaded area where plaintiff was struck by a car). *Peters* is completely consistent with *Ayers*, in which this Court dispelled any doubt that the railroad was liable in such instances of multiple causation. *See Ayers*, 538 U.S. at 159-66. In sum, there was nothing untoward in the imposition of liability in the cases that Norfolk Southern offers as examples of the purportedly unreasonable scope of the FELA. *See also Bailey v. Norfolk & W. Ry.*, 942 S.W.2d 404, 408 (Mo. Ct. App. 1997) (alleging railroad negligence in providing unsafe conditions in its sleeping facilities).

Norfolk Southern also worries about its ability to recover compensation from other tortfeasors if the railroad can be liable under a standard of less than proximate cause. Nothing in the legislative history suggests Congress shared this concern. Nowhere is it even hinted that Congress thought a railroad worker should bear the burden of no recovery just because the railroad may not be able to recover its payments to the employee arising out of its own negligence. At any rate, this case does not present that situation and resolution of the question of contribution is best left for another day.

In sum, Norfolk Southern has offered no persuasive reason for changing the long-standing interpretation of the FELA as permitting liability on a showing of less than proximate cause. Even if it had, such arguments are for Congress, not this Court.

III. THE INSTRUCTION BELOW CONTAINING DUAL CAUSATION STANDARDS WAS NOT REVERSIBLE ERROR.

Norfolk Southern has unquestionably abandoned its prior contention that a lightened causation standard applies to plaintiff's contributory negligence under the FELA by repeatedly conceding in its merits brief that the appropriate standard is proximate cause. *See, e.g.*, Br. of Pet'r at 3 (Congress "did not change the common-law causation standards . . . . [T]he negligence (or contributory negligence) must be a proximate cause . . . ."); 50 ("Proximate cause is the rule for both negligence and contributory negligence under FELA.") The Court should not allow Norfolk Southern to transform its argument yet again in its reply brief to somehow justify addressing this issue.

However, if this Court reaches the merits and addresses the question presented in the Petition, as opposed to the question as reframed and newly presented in Norfolk Southern's Brief, then it should affirm the Missouri court's judgment, notwithstanding the use of the "in whole or in part" standard in the instruction on railroad negligence, but not in the instruction on contributory negligence.

A. The FELA Creates A Workable System Where The Causation Standard For The Railroad's Negligence Is Lighter Than That Applicable To Plaintiff's Contributory Negligence.

As many commentators and courts have observed, proximate causation (despite its name) has more to do with scope of responsibility, than with causation. *See, e.g.*, Dan

B. Dobbs, *The Law of Torts*, ch. 10, § 180, at 443 (2001); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264, 274-75 (5th ed. 1984); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point"). By authorizing railroad liability on a showing of less than proximate cause, *see supra* Part II.A., Congress expanded the railroad's scope of responsibility – a result completely consistent with the legislative history.

But Congress, in this law benefiting injured railroad workers, evidenced no commensurate desire to lighten the causation standard for plaintiff's contributory negligence. Nor would the lightening of that standard have comported with Congress' unquestionable purpose in enacting the statute: shifting financial responsibility for injuries from the worker to the railroad. *See Ayers*, 538 U.S. at 161; *Gottshall*, 512 U.S. at 542. Thus, while Congress took care to use the phrase – "resulting in whole or in part" – in both the statutory section concerning defendant's negligence and the section abolishing assumption of the risk as a defense, it did not use any language signaling a departure from proximate causation with respect to plaintiff's contributory negligence. *See* 45 U.S.C. §§ 51, 53, 54. That is why the Missouri Supreme Court used different language in its contributory negligence instruction than it did in its negligence instruction. For contributory negligence, the traditional conception of proximate cause – a standard that best serves congressional goals of safety and compensation for railroad workers – continues to apply.

In arguing against divergent causation standards, Norfolk Southern contends that the FELA holds each party responsible for its own negligence, suggesting that this can only be

fairly achieved if the same causation standard applies to each party. Br. of Pet'r at 3, 8, 22. This argument oversimplifies the FELA. While injured workers are responsible for only their own negligence, that limitation of responsibility is not true as to the railroad, because the railroad's scope of liability extends beyond its own negligence to include the causal negligence of third-parties. *See Ayers*, 538 U.S. at 166. Thus, Norfolk Southern's contention that the FELA was intended to achieve perfect parity between workers and railroads is patently false.

Another example of this arises under the portion of the FELA which provides that a violation by the railroad of the former Boiler Inspection Act or the Safety Appliance Act creates automatic liability even if the employee was guilty of contributory negligence. *See* 45 U.S.C. § 53. This provision creates a lack of parity, but Congress intentionally did so to further the interests of railroad safety and enable worker recovery for railroad injuries.

Norfolk Southern's concern about the workability of a statutory scheme with dual standards of causation also misses the mark, as it misconstrues the nature of a comparative negligence regime. Br. of Pet'r at 22-24, 48-49. Contrary to Norfolk Southern's intimations, asking a jury to consider a proximate causation standard for an employee's contributory negligence and a relaxed causation standard for a railroad's negligence is not tantamount to comparing apples to oranges. Rather, the causation standards merely serve as a gatekeeper to determine which acts or omissions are relevant when assessing the parties' comparative fault. In other words:

> The sole function of a legal cause standard in this comparative negligence system is to signify when a comparison is to be made: under a dual standard of legal cause a comparison of negligence will be made whenever the defendant's negligence was

> the simple cause and the plaintiff's negligence the common-law proximate cause of the latter's injuries. Once the legal cause test indicates that a comparison is to be made, its function in the comparative negligence system is over. Then the acts or omissions of the plaintiff are balanced against the combined acts or omissions of both parties. . . [T]he increased degree of cause or culpability of one party when his acts or omissions were the proximate cause of the plaintiff's injury does not mean that his negligence cannot be compared with that of another party whose degree of cause or culpability is less . . . .

Charles H. Traeger, III, *Legal Cause, Proximate Cause, & Comparative Negligence in the FELA*, 18 STAN. L. REV. 929, 935 (1966). The jury instruction in this case reflected this exact conception of the relevant comparison as it informed the jury to reduce Sorrell's award "in proportion to the amount of negligence attributable to" him. L.F. 26.

Even assuming *arguendo* that these dual standards of causation do require some comparison between dissimilar types of actions, such comparisons are made by juries on a regular basis. For example, negligence under the traditional common law requires proof of proximate cause, while intentional conduct consists of conduct "substantially certain" to result in injury to another. *Blazovic v. Andrich*, 590 A.2d 222, 231 (N.J. 1991) (quoting *Restatement (Second) of Torts* § 8A comment b (1965)). Any comparison of fault between negligent and intentional conduct would require application of different causation standards. Yet, courts have allowed juries to balance a plaintiff's intentional conduct against defendant's negligence, (*see, e.g., Hickey v. Zezulka*, 487 N.W.2d 106, 123-24 (Mich. 1992)), and a plaintiff's negligence against defendant's intentional conduct, (*Barth v.*

Coleman, 878 P.2d 319, 320-21 (N.M. 1994); *Bonpua v. Fagan*, 602 A.2d 287 (N.J. Sup. Ct. App. Div. 1992); *see, e.g., Bisaillon v. Casares*, 798 P.2d 1368, 1369-70 (Ariz. Ct. App. 1990); *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So.2d 70, 77-78 (La. Ct. App. 1989); *Comeau v. Lucas*, 455 N.Y.S. 2d 871, 872 (N.Y. App. Div. 1982)). The comparative fault statutes of some states even expressly permit the comparison of plaintiff's negligence to defendant's intentional, reckless or willful conduct. *See, e.g.*, N.D. Cent. Code §32-03.2-02 (1993). These comparative schemes involving different causation standards have all proved workable. *See Hickey*, 487 N.W.2d at 124 (juries are "capable of reaching a rational and sensible balance between the" two parties' fault).

Moreover, allowing different causation standards for negligence and contributory negligence presents no more challenge to juries than they regularly face when considering a products liability claim based on a manufacturing defect or a maritime claim of unseaworthiness. A products liability claim based on a manufacturing defect and a maritime claim of unseaworthiness both impose strict liability on the defendant, so that the defendant's negligence is irrelevant. *See Restatement (Third) of Torts: Product Liability* § 2(a) (1998); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946). The jury must nevertheless compare plaintiff's contributory negligence, if any, to defendant's strict (non-negligent) liability to determine plaintiff's recoverable damages. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1953) (plaintiff's negligence considered in determining recovery in unseaworthiness action); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 429 (1939); Romualdo P. Eclavea, *Applicability of Comparative Negligence Doctrine to Actions Based on Strict Liability in Tort*, 9 A.L.R. 4th 633 (1981 & Supp. 2005) (collecting cases from 25 States that apply comparative negligence to strict products liability).

The courts, including this Court, have found juries fully capable of making such a disparate comparison. *See, e.g., Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963) (unseaworthiness claim when joined with claim under the Jones Act is triable to a jury); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1462 (6th Cir. 1993) (The comparison of strict liability to comparative fault "appears to have posed little problem in cases tried by juries."); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1304 (Utah 1981) ("There may be semantic difficulties in comparing strict liability and negligence, but we believe that judges and juries will have no difficulty assigning the relative responsibility each is to bear for a particular injury when the ultimate issues in such comparisons are relative fault and relative causation."). Thus, there is no reason to think that juries cannot function effectively with dual standards of causation. They do all the time.

Even if a scheme with dual causation standards for negligence and contributory negligence is more difficult to administer than one with a single standard, that alone is not reason to conclude that Congress must have intended identical causation standards for both. Indeed, the House Report rejected just such an argument advanced by critics of the 1908 Act:

> It is not a just criticism of a law, conceding the righteousness of its principles, to say that it is impracticable of administration. We submit that the principle in this section is ideal justice, against which no fair argument can be made. It is better that legislatures pass just and fair laws, even though they may be difficult of administration by the courts, rather than to pass unjust and unfair laws because they may be more easily administered by the courts.

H. R. Rep. No. 60-1386, at 4 (1908). Thus, this Court's interpretation should be guided by its precedents and congres-

sional intent, and not some abstract objection that dual causation standards would somehow impede the judicial administration of the Act.

Since a dual scheme is both workable and consistent with this Court's precedents and the statutory scheme, the instruction below was not erroneous as a matter of law. Nothing in the FELA is to the contrary.

B. Any Error In Instructing The Jury Using A Proximate Cause Standard For Contributory Negligence Was Harmless.

Instructing the jury using "directly resulted" rather than "resulting in whole or in part" could not have affected the jury's verdict. For one reason, it is unlikely that the distinction between the two causation standards has any practical significance in any case. *See Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 823 (5th Cir. 1965) ("At the outset, there is the doubt that such casuistries have any practical significance as the jury, undergoing its once in-a-lifetime exposure to the equivalent of a law school lecture, seeks to translate instruction into definitive answers . . . ."); *Caplinger v. Northern Pac. Terminal*, 418 P.2d 34, 36 (Or. 1966) ("It is not exactly clear what real difference the double standard instruction would make in the trial of a Federal Employers' Liability Act case.").

In this case in particular, it was simply not possible that instructing the jury using a proximate cause standard rather than a lightened causation standard for contributory negligence had any effect. Sorrell's only potential negligence resulted from the way in which he drove his truck – whether he pulled the truck too far to the side of the road, drove off the road, or pulled the truck too severely back onto the road. If the jury found that Sorrell was negligent in any of these ways, it must necessarily have also found that this negligence "directly contributed to cause his injury." Indeed, it is difficult to conceive of a cause to a vehicle accident that could be

any more direct than the driver's conduct. Thus, the instruction on contributory negligence, even if erroneous, did not affect the outcome of the trial, and reversal is not warranted. *See Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922); *Deery v. Cray*, 77 U.S. 263, 272 (1869); *E. Transp. Line v. Hope*, 95 U.S. 297, 302-03 (1877).

Given the harmless nature of the error, if any, in this case, and Norfolk Southern's failure to discuss this issue in its opening brief, and instead to advocate an issue waived at every stage of the litigation, including the Petition, this Court should not address the contributory negligence causation issue. *Cf. Adams*, 520 U.S. at 90-92 (court benefits from fully developed factual and legal record).

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted, or, alternatively, the judgment should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Writ of Certiorari to the Missouri Court of Appeals

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. THE MISSOURI RULE OF DIVERGENT CAUSATION STANDARDS SHOULD BE REJECTED	1
II. PROXIMATE CAUSE IS THE PROPER STANDARD FOR BOTH RAILROAD AND CONTRIBUTORY NEGLIGENCE	8
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

BE&K Constr. Co. v. *NLRB*, 536 U.S. 516 (2002) 4
Ballard v. *Commissioner*, 544 U.S. 40 (2005) 3
Brady v. *Southern Ry.*, 320 U.S. 476 (1943) 13
Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 14
City of Canton v. *Harris*, 489 U.S. 378 (1989) 9, 10
Carlson v. *Green*, 446 U.S. 14 (1980) 11
Carter v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949) 15
Chapman v. *Union Pac. R.R.*, 467 N.W.2d 388 (Neb. 1991) 20
Consolidated Rail Corp. v. *Gottshall*, 512 U.S. 532 (1994) 7
Consolidated Rail Corp. v. *Richards*, 540 U.S. 1096 (2003) 11
Coray v. *Southern Pac. Co.*, 335 U.S. 520 (1949) 15
Curlee v. *Southern Ry.*, 115 S.E. 628 (S.C. 1923) 16
Davis v. *Wolfe*, 263 U.S. 239 (1923) 10, 13
Dennis v. *Denver & Rio Grande W. R.R.*, 375 U.S. 208 (1963) 18, 19
Director, OWCP v. *Greenwich Collieries*, 512 U.S. 267 (1994) 20
Director, OWCP v. *Newport News Shipbldg. & Dry Dock Co.*, 514 U.S. 122 (1995) 5
Egslaer v. *Scandrett*, 151 F.2d 562 (7th Cir. 1945) 17
Gallick v. *Baltimore & Ohio R.R.*, 372 U.S. 108 (1963) 18
Gasoline Prods. Co. v. *Champlin Ref. Co.*, 283 U.S. 494 (1931) 5
Illinois v. *Gates*, 462 U.S. 213 (1983) 2, 3

TABLE OF AUTHORITIES – CONTINUED

	Page
Illinois Cent. R.R. v. *Skaggs*, 240 U.S. 66 (1916)	6
Inman v. *Baltimore & Ohio R.R.*, 361 U.S. 138 (1959)	19
Kernan v. *American Dredging Co.*, 355 U.S. 426 (1958)	19
Lang v. *New York Cent. R.R.*, 255 U.S. 455 (1921)	13
Leake v. *Burlington N. R.R.*, 892 S.W.2d 359 (Mo. Ct. App. 1995)	9
Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995)	9
Louisville & Nashville R.R. v. *Layton*, 243 U.S. 617 (1917)	19
Marazzato v. *Burlington N. R.R.*, 817 P.2d 672 (Mont. 1991)	20
Mapp v. *Ohio*, 367 U.S. 643 (1961)	9
McCrowell v. *Southern Ry.*, 20 S.E.2d 352 (N.C. 1942)	16
Metro-North Commuter R.R. v. *Buckley*, 521 U.S. 424 (1997)	20
Milwaukee & St. Paul Ry. v. *Kellogg*, 94 U.S. 469 (1876)	13
Minneapolis & St. L. R.R. v. *Gotschall*, 244 U.S. 66 (1917)	19
Monell v. *Department of Soc. Servs.*, 436 U.S. 658 (1978)	20
Monessen Sw. Ry. v. *Morgan*, 486 U.S. 330 (1988)	5, 8
New Hampshire v. *Maine*, 532 U.S. 742 (2001)	9
Norfolk S. Ry. v. *Schumpert*, 126 S. Ct. 663 (2005)	11
Norfolk & W. Ry. v. *Ayers*, 538 U.S. 135 (2003)	5, 12
Norfolk & W. Ry. v. *Earnest*, 229 U.S. 114 (1913)	8

TABLE OF AUTHORITIES – CONTINUED

Page

Northwestern Pac. R.R. v. *Bobo*, 290 U.S. 499 (1934) 13
Office of Pers. Mgmt. v. *Richmond*, 496 U.S. 414 (1990) 4
Palazzolo v. *Rhode Island*, 533 U.S. 606 (2001) 3
Posen v. *Sitecon, LLC*, No. 86239, 2006 WL. 1774131 (Ohio Ct. App. June 22, 2006) 7
Ricketts v. *Kansas City Stock Yards Co. of Me.*, 484 S.W.2d 216 (1972) 9
Rodopoulos v. *Sam Piki Enter., Inc.*, 570 So. 2d 661 (Ala. 1990) 6
Rogers v. *Missouri Pac. Ry.*, 352 U.S. 500 (1957) 5, 8, 15, 16, 17
Rumsfeld v. *Forum for Academic & Inst'l Rights, Inc.*, 126 S. Ct. 1297 (2006) 3
Schacht v. *United States*, 398 U.S. 58 (1970) 4
Seaboard Air Line Ry. v. *Tilghman*, 237 U.S. 499 (1915) 6
Shalala v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2003) 14
St. Louis-S.F. Ry. v. *Mills*, 271 U.S. 344 (1926) 13
Tennant v. *Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944) 10, 13
Thompson v. *Hirano Tecseed Co.*, 456 F.3d 805 (8th Cir. 2006) 7
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) 14, 17
United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *overruled on other grounds, Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) 9
United States v. *Gonzales*, 520 U.S. 1 (1997) 10
United States v. *Price*, 361 U.S. 304 (1960) 14
United States v. *Wells*, 519 U.S. 482 (1997) 9

TABLE OF AUTHORITIES – CONTINUED

Page

U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995) 4
Urie v. *Thompson*, 337 U.S. 163 (1949) 8, 19
Vance v. *Terrazas*, 444 U.S. 252 (1980) 11
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991) 9
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 3
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 3
Zedner v. *United States*, 126 S. Ct. 1976 (2006) 9

STATUTES

45 U.S.C. § 51 ..... 12, 15
§ 53 ..... 6, 7
§ 54 13

RULES

Sup. Ct. R. 15.2 10
Mo. Sup. Ct. R. 84.13 20

LEGISLATIVE HISTORY

H.R. Rep. No. 60-1386 (1908) 7

SCHOLARLY AUTHORITY

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 7

OTHER AUTHORITY

Restatement (Second) of Torts (1965) 7

REPLY BRIEF

Missouri is the only jurisdiction in the United States that instructs juries to apply a different and more stringent standard of causation to contributory negligence than to railroad negligence under the Federal Employers' Liability Act (FELA). Missouri is both stubborn and wrong. Nothing in the statutory language supports its rule. The long-established rule of the common law (and of admiralty and comparative negligence schemes) both in 1908 and today is that defendant negligence and contributory negligence are measured by the same standard: proximate cause. In any event, divergent causation standards are irreconcilable with the comparative negligence scheme of FELA, and the Missouri asymmetry must be rejected no matter whether proximate or slightest cause is the proper standard. Respondent has no answer for any of these points, and his contention that the writ should be dismissed – because purportedly this Court cannot decide what causation standard governs railroad negligence – has no substance.

I. THE MISSOURI RULE OF DIVERGENT CAUSATION STANDARDS SHOULD BE REJECTED.

1. Respondent begins by urging this Court to dismiss the writ as improvidently granted, signaling an inability to defend the Missouri rule on the merits. Indeed, his argument for dismissal of the writ is an exercise in confusion, directed not at the question presented, but at one set of arguments that Norfolk Southern ("NS") has made in favor of reversal.

The sum and substance of respondent's argument for dismissal of the writ is that NS waived "any challenge to the instruction on railroad negligence" by not objecting below to that instruction. Resp. Br. 1. This argument wholly misses the mark. That argument would only be relevant if NS had asked this Court to review its *liability*, and if the railroad had not objected to the instruction resulting in that liability and the Missouri Court of Appeals had not passed on the issue. But NS has sought review of the judgment for instructional error in the *apportionment of damages*, on the grounds that

FELA does not require a higher showing of causation for contributory than for railroad negligence. Pet. (i), 12-15.

Respondent does not dispute that this Court has jurisdiction over the question presented. The question presented in the petition is "[w]hether the court below erred in determining ... that the causation standard for employee *contributory negligence* under the Federal Employers Liability Act ("FELA") differs from the causation standard for railroad *negligence*." Pet. (i). This Court will exercise jurisdiction to decide a federal question pressed *or* passed on in the state court below. *Illinois* v. *Gates*, 462 U.S. 213, 217-24 (1983) (declining to decide whether that rule is prudential or jurisdictional). Here, the question presented was both pressed and passed on below. NS argued below that the causation standards for railroad and contributory negligence should be the same and asked that the same causation instruction based on the "whole or in part" language of section 1 of FELA be given for both railroad and employee negligence. See J.A. 9-10; Pet. App. 28a-29a (arguing that MAI 32.07 on contributory negligence "misstates the law because that is a different standard" which requires the defendant's proof to meet "a much more exacting standard" than the instruction on railroad negligence). NS renewed this issue in the court below, and the Missouri Court of Appeals decided that issue adversely:

> Norfolk contends that in a FELA case where contributory negligence is an issue, the causation standard should be the same as to the plaintiff and the defendant. However, Rule 70.02 provides that whenever "Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any instructions on the same subject." Here, the instruction patterned after MAI 32.07(B) was the correct instruction. MAI 32.07(B) has been determined to be the applicable instruction in cases such as the present case. Thus we cannot convict the

> trial court of error in giving the applicable MAI as determined by the Supreme Court of Missouri.

Pet. App. 7a.

Respondent instead makes the novel argument that even if the question presented was both pressed and passed on below, this Court should not decide that issue because NS has also asked this Court to clarify the legal standard of causation for railroad negligence in the process of correcting the obvious legal error. Resp. Br. 13-18. This contention has no force. This Court always has discretion to decide "a question anterior to" the question presented, *Ballard* v. *Commissioner*, 544 U.S. 40, 47 n.2 (2005), regardless of what the parties argued below (or even in this Court).[1] There can be no doubt that the causation standard for railroad negligence is anterior to the question of whether FELA permits divergent causation standards for railroad and contributory negligence, and thus within the Court's province to decide. But even if this Court were inclined to decide only the precise question presented, the answer is to save the proximate cause issue for another day.[2] The Court still needs to eliminate Missouri's plain mis-

[1] This Court may reach any issue "so connected with [the question presented] in substance as to form but another ground or reason for alleging the invalidity of the lower court's judgment." *Illinois* v. *Gates*, 462 U.S. 213, 220 (1983) (alteration and internal quotation marks omitted). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992); *see also Rumsfeld* v. *Forum for Academic & Inst'l Rights, Inc.*, 126 S. Ct. 1297, 1304 (2006) ("granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says," and the Court need not "accept an interpretation of a statute simply because it is agreed to by the parties"). Furthermore, respondent's objection to the consideration of the causation standard for railroad negligence is both unfounded and waived. *Infra* part II.

[2] *See Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977) ("We leave open for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard, and note here only that it is narrower than the standard set forth in dicta in *Fay* v. *Noia*, 372 U.S. 391 (1963) .... "); *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 631-32 (2001) (deciding case as it

reading of FELA. The question of divergent standards is of substantial importance and is the basis of a circuit conflict, Pet. 12-15; even if *arguendo* Congress did intend to eliminate proximate cause, there is no warrant for the aberrant Missouri rule that is irreconcilable with a comparative negligence scheme, and stacks the deck against railroads.

Respondent can conjure no reason why this Court cannot decide the question on this limited basis, so he makes the false statement that NS has "abandoned" the position that equivalent causation standards are necessary under the "slightest cause" rule. Resp. Br. 2. NS has abandoned nothing. It has consistently argued in the alternative, both at the petition and the merits stage, that FELA does not permit divergent causation standards for railroad and contributory negligence, even if the proper standard for the former is "slightest cause." Pet. 14-15; Pet. Reply Br. 8; Petr. Br. 49-50 ("Alternatively, if this Court were to rule that 'slightest cause' is the standard that a jury should apply to railroad negligence, there is no basis for maintaining divergent standards, and that same standard must be applied to claims of employee contributory negligence as well. *Page* v. *St. Louis Sw. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965).").[3]

"comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim"); *see also BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 537 (2002); *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 829 (1995); *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 423 (1990); *Schacht* v. *United States*, 398 U.S. 58, 62 (1970).

[3] Finally, it is hard to fathom the contention that this Court would render an advisory opinion if it decided this case. If this Court rules that the same standard of proximate cause applies to both contributory negligence and railroad negligence, NS is entitled to a new trial because MAI 32.07 added a "directly" requirement to the statutory language to connote proximate cause for contributory negligence only, misleading the jury by requiring a more stringent level of proof. If the Court agrees with respondent that the standard for railroad negligence is "slightest cause," but agrees with NS that the same standard must apply to comparative negligence, NS would likewise be entitled to a new trial because it did not receive an equivalent instruction for contributory negligence. If the Court leaves open the question of the content of the standard, but simply holds

2. On the merits, respondent is unable to defend the Missouri rule. Respondent argues that FELA enacts a bizarre comparative negligence scheme that imposes different causation standards on plaintiffs and defendants. In so doing, he forsakes any analysis of the statute, the common law, and this Court's longstanding FELA precedents. He stakes his entire position on the untenable claim that *Rogers* v. *Missouri Pacific Railway*, 352 U.S. 500 (1957), overruled a half-century of this Court's precedents (despite his vehemence that the Court not decide the point) and on "that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Director, OWCP* v. *Newport News Shipbldg. & Dry Dock Co.*, 514 U.S. 122, 135 (1995).

Tellingly, respondent finds no support in the statutory language of FELA for a scheme of divergent causation standards. Indeed, he steadfastly ignores the longstanding rule that Congress is not deemed to have departed from the common law in FELA unless it did so expressly. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003); *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337-38 (1988).

NS has demonstrated that the rule at common law in 1908 was (and today still is) that the same causation standards apply to both defendant and contributory negligence. Petr. Br. 12-14. Respondent makes no effort to dispute this. Thus, in order to show that FELA departed from this common law rule, respondent must point to an explicit alteration of that

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that FELA requires equivalence, then for the same reasons, the trial court on remand would grant a new trial. Moreover, because the error on review pertains to apportioning damages, it will be necessary on remand to grant a full new trial, since "the question of damages ... is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U.S. 494, 500 (1931). Obviously, the court on remand would benefit from direction from this Court concerning the proper meaning of causation under FELA.

rule in the statute. He cannot do so.

Not only is there no express departure, but there also is no basis for imputing to Congress an intent to depart from the common law rule of equivalence. Congress looked to both emerging comparative negligence schemes and admiralty in fashioning FELA; under each of those legal regimes in 1908, the same causation standard applied to both defendant and plaintiff negligence. *Id.* at 14-17. Nor can respondent find support in the current common law. Under modern common law (as well as admiralty and comparative negligence systems), once again the same standard of causation applies to both plaintiff and defendant negligence. *Id.* at 19-21.

Divergent causation standards are also inimical to the operation of the FELA comparative negligence scheme. Congress directed that contributory negligence shall not bar a recovery, but that the damages shall be diminished by the jury "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. This provision requires a jury to determine the total "causal negligence," and divide damages according to the respective shares of the total negligence attributable to the railroad and to the employee. *Seaboard Air Line Ry.* v. *Tilghman*, 237 U.S. 499, 501 (1915). The intent is that the railroad would "'be responsible to the extent to which it was to blame, and the plaintiff would be responsible himself to the extent to which he was to blame.'" *Illinois Cent. R.R.* v. *Skaggs*, 240 U.S. 66, 73 (1916). Thus, under FELA, damages are apportioned according to relative negligence, not relative causal contribution.

Respondent diverts the Court's attention to a few state-law schemes allowing comparison among parties liable for different kinds of *fault*. Resp. Br. 43-46.[4] But in FELA the only

[4] Even as to these few schemes, respondent fails to support his claim that there are material differences in causation standards. Although intentional acts may alter the causation analysis, *Rodopoulos* v. *Sam Piki Enter., Inc.*, 570 So. 2d 661, 665 (Ala. 1990) (a broader range of harms are considered proximately caused by intentional torts), causation that is a substantial factor in the injury, whether denominated legal or proximate

kind of fault that is compared is the *negligence* of the railroad and employee. 45 U.S.C. § 53. There is no system anywhere in the law that subjects the negligence of plaintiff and defendant to different causation standards in determining responsibility for a single injury, and it would be particularly anomalous to adopt such a rule when the entire purpose of FELA is to divide damages according to relative negligence. Congress did not fashion a novel scheme of divergent causation standards that will, in a fair number of cases, prevent the just apportionment of damages on the basis of relative negligence, especially one that would come at the price of confusing a jury with the application of different causation standards to the same injury. Petr. Br. 47-48. Even if *arguendo* the Missouri rule were not wholly unworkable, the traditional rule of equivalent causation standards is far more consonant with the congressional purpose to make "each party responsible for his own negligence, and require[] each to bear the burden thereof." H.R. Rep. No. 60-1386, at 1 (1908).

At the end of the day, respondent resorts to the putative broad purposes of the Act to maximize plaintiff recovery, arguing that FELA should be interpreted to function like a worker's compensation statute (albeit with full recovery of tort damages). Resp. Br. 3, 22-23. But Congress rejected the European worker's compensation models in favor of the emerging comparative negligence models of the states, retaining common-law rules except insofar as it expressly departed therefrom. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994); Petr. Br. 15-17. This Court has disapproved

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cause, is required for all actions for damages in tort. *Restatement (Second) of Torts* § 9 (1965); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43 (5th ed. 1984); *Posen* v. *Sitecon LLC*, No. 86239, 2006 WL 1774131, at *4 (Ohio Ct. App. June 22, 2006) ("'It is not sufficient to demonstrate that injury was substantially certain to occur,'" for "[c]ourts continue to require a plaintiff in an intentional tort case to establish the proximate cause of his injuries"). Respondent (Br. 44) also implies that products liability or other forms of strict liability dispense with proximate cause. That is not true. *Prosser & Keeton*, *supra*, § 103; *Thompson* v. *Hirano Tecseed Co.*, 456 F.3d 805, 812 (8th Cir. 2006).

the view that FELA should be interpreted to maximize plaintiff recovery, *Morgan*, 486 U.S. at 337-39, and has found common-law rules of causation consistent with its liberal purposes, *Urie* v. *Thompson*, 337 U.S. 163, 195 n.34 (1949). The purpose of the statute was to eliminate contributory negligence as a bar to recovery, and instead make it a basis for apportioning damages. Congress did not seek to ensure maximum recoveries for employees who caused their own injuries in part through negligence; rather, Congress intended that such plaintiffs "*not* recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both." *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 122 (1913) (emphasis added). Respondent's rule would subvert the purposes of the Act. Thus, no matter what causation standard applies to railroad negligence, the standard for contributory negligence should be the same.

II. PROXIMATE CAUSE IS THE PROPER STANDARD FOR BOTH RAILROAD AND CONTRIBUTORY NEGLIGENCE.

This Court should also clarify that the Missouri rule is based on a false predicate: namely, that *Rogers* v. *Missouri Pacific Railway*, 352 U.S. 500 (1957), abrogated the long-standing FELA rule that a plaintiff must prove that railroad negligence is a contributory proximate cause of the injury. This misconception causes much mischief in FELA litigation, and contrary to respondent's claims this Court is free to decide this issue in resolving the question presented.

1. Respondent insists that even if the question presented were both pressed and passed on below, this Court is limited to deciding it on the grounds pressed or passed on below. Resp. Br. 13-18. As NS has already shown, that is not the law; in rendering judgment on the question presented, this Court is not constrained by the legal theories that a party advocated below (or even continues to advocate in this Court).

See *supra* n.1 (citing *Gates, Yee*, and *Rumsfeld*).[5] Respondent's complaint that NS has "taken a wholly inconsistent position," Resp. Br. 20, sounds in judicial estoppel, but respondent does not (and cannot) contend that estoppel applies. NS did not propose the instruction on railroad negligence, but simply did not challenge the binding MAI, Resp. Br. 6; it did not prevail below on either railroad or contributory negligence; and its position below did not prejudice respondent, who did prevail below on both issues. *See Zedner* v. *United States*, 126 S. Ct. 1976, 1987 (2006) (stating elements of judicial estoppel); *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001). Instead, respondent's unfounded rule of foreclosure would swallow the law of judicial estoppel.[6]

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[5] *See also Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995) (ruling in favor of petitioner on grounds "expressly disavowed" below and not argued until the brief on the merits); *City of Canton* v. *Harris*, 489 U.S. 378, 384 (1989) (ruling in favor of petitioner who had conceded the key legal question below); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 372 n.4 (1967) (ruling in favor of United States on changed theory), *overruled on other grounds*, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (deciding that exclusionary rule should apply to the States even though that issue was not presented below or in the parties' briefs).

[6] Regardless, even the unfounded rule respondent advocates would not avail his cause. NS admittedly did not challenge in state court the long-standing decisions of the Missouri Supreme Court interpreting *Rogers* to reject proximate cause as the standard for railroad negligence, *Ricketts* v. *Kansas City Stock Yards Co. of Me.*, 484 S.W.2d 216, 221-22 (1972) (en banc), and Missouri counsel did not make what (in light of those precedents) would have been a futile objection at trial to the MAI verdict-director instruction on railroad negligence. But although the proximate-cause argument was not *pressed* by NS below, it was *passed on* below: the Missouri Court of Appeals held that the proximate cause standard embodied in MAI 32.07, *Leake* v. *Burlington N. R.R.*, 892 S.W.2d 359, 365 (Mo. Ct. App. 1995), applied to contributory negligence claims even though not to railroad negligence claims. Pet. App. 6a-7a. *See Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (even where issue of causation not pressed, the court below addressed entitlement to relief, and thereby passed on causation); *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (waiver rules of lower courts do not bind this Court).

In any event, it is too late in the day for respondent to raise these objections because he did not raise them in his brief in opposition to the petition for certiorari. After falsely stating that the petition nowhere raises the issue, (Resp. Br. 1), respondent grudgingly acknowledges (*id.* at 19) that NS specifically argued in its petition – in the text, not in a footnote, and with accompanying citation – that "[t]he predicate rule in Missouri that FELA eliminates the proximate cause requirement for railroad negligence is contrary to federal law, see *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)." Pet. 14-15. Respondent claims that he has no obligation to object to legal positions that are not expansively argued in the petition. Resp. Br. 19. Rule 15.2 is to the contrary. It requires counsel to object "in the brief in opposition, and not later," to "*any* perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2 (emphasis added); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). If omitted from the opposition, "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived." Sup. Ct. R. 15.2.

Thus, this Court has admonished that it "will not dismiss the writ as improvidently granted" when an objection that an issue was not pressed below is not stated in the brief in opposition, for "'[t]he decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits ... of the question presented.'" *Canton*, 489 U.S. at 384 (1989) (omission in original). Here, this Court decided to grant plenary argument rather than the summary reversal that NS requested in the alternative. Pet. 15-20. In so doing, this Court clearly understood that, in resolving the question presented of whether the FELA causation standards for railroad and contributory negligence differ, the content of those stan-

dards would be placed in issue. Indeed, respondent's central contention in his brief in opposition was that "in *Rogers*, the Court held that FELA section 51 explicitly abrogates the employer's traditional common-law causation standard," but that "neither the purpose nor plain language of FELA section 53 demands the same conclusion for the employee's contributory negligence." Opp. 5. Respondent further asked this Court to discount the earlier precedents on which NS relied because "they were all decided before *Rogers* definitively established that the defendant's causation standard was not the traditional common-law measure, but rather the relaxed 'in whole or in part' causation standard." *Id.* at 6. The issue of the proper causation standard for railroad negligence was clearly joined in the petition-stage briefs. See also Pet. Reply 5-8 (rebutting these arguments).

There is no prudential reason for this Court not to give the question presented plenary treatment, and to decide an anterior question that is fully and exhaustively briefed by both sides. *Vance* v. *Terrazas*, 444 U.S. 252, 258-60 & n.5 (1980) (deciding whether a statute requires proof of specific intent to renounce U.S. citizenship, despite Government's change in position, because "the issue of intent is important, the parties have briefed it, and we shall address it"). The causation standard for railroad negligence is a recurring and important pure issue of federal law. *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980).[7] Finally, the defining question of whether *Rogers* overruled a series of this Court's precedents is one that can only be resolved by this Court, and there is no conceivable

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[7] NS and its affiliated companies have twice asked this Court in recent years to clarify the scope of *Rogers* and resolve the question of the proper causation standard for railroad negligence. *Consolidated Rail Corp.* v. *Richards*, 540 U.S. 1096 (2003); *Norfolk S. Ry.* v. *Schumpert*, 126 S. Ct. 663 (2005). Contrary to respondent's assertion, Resp. Br. 21 & n.14, NS took the exact same position on causation in *Ayers*, 538 U.S. 135, that it does today. *See Ayers* Reply Br., at 18 ("The longstanding rule of causation under FELA before and after [*Rogers* and other decisions] is proximate cause") (discussing authorities).

benefit from awaiting further percolation in the circuits (given that almost every circuit has resolved the issue one way or the other and is unlikely to change its rule).

2. Respondent's position that *Rogers* abrogated the rule of contributory proximate cause is indefensible.

> The FELA "abolished the fellow servant rule"; "rejected the doctrine of contributory negligence in favor of comparative negligence"; "prohibited employers from exempting themselves from the FELA through contract"; and, in a 1939 amendment, "abolished the assumption of risk defense." [*Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 542-43 (1994)]; see 45 U. S. C. §§ 51-55. "Only to the extent of these explicit statutory alterations," however, "is the FELA 'an avowed departure from the rules of the common law,'"

Ayers, 538 U.S. at 145 (ellipsis and brackets omitted).

Respondent cannot point to any express statutory departure from the common law rule of proximate cause. This is with good reason: As NS has demonstrated, FELA's authorization of recovery if the injury or death "result[ed] in whole or in part from the [railroad's] negligence," 45 U.S.C. § 51, is not a departure from the common law, but *is and was* the common-law rule under prevailing conceptions of proximate cause for both defendant and contributory negligence. Petr. Br. 29-33. Respondent does not dispute the many cases and authorities NS cites for that proposition. Instead, he offers the weak and circular rejoinder that the pre-1908 cases NS cites "neither interpret that language in a statutory context nor consider whether the phrase bears on the applicable causation standard." Resp. Br. 24 n.17. That is precisely the point; those cases establish the common-law rule that is presumed to have been adopted in FELA absent an express departure.

Not only was "in whole or in part" the prevailing common-law rule, but this Court has long interpreted this statutory language to incorporate proximate cause: the plaintiff must prove that "negligence was *the proximate cause in whole or in part*"

of the employee's injury. *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944) (emphasis added). Respondent suggests that the many pre-*Rogers* cases on proximate cause should be discounted because (1) before *Rogers* this Court supposedly never had the "opportunity to address the appropriate causation standard for railroad negligence" and the term was never "essential to [the] decision," Resp. Br. 34, and (2) the 1939 Amendments supposedly "clarif[ied]" that proximate cause is not the rule, *id.* at 23 & n.15. Both statements are demonstrably false.

As to the first, the rule of proximate cause was essential to a number of this Court's decisions granting judgment as a matter of law to defendants for lack of proof of proximate cause. *Lang* v. *New York Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S. F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926); *Northwestern Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934). Moreover, in at least two cases prominently featured in NS's brief (Br. 27-28), yet not distinguished or even cited by respondent, this Court explicated the content of that standard in detail. *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Brady* v. *Southern Ry.*, 320 U.S. 476, 483 (1943) (adopting the proximate-cause rule of *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U.S. 469, 475 (1876)). More fundamentally, no concept of "proximate cause" can be reconciled with respondent's "slightest cause" concept, which is a rule of but-for causation. Petr. Br. 45-47.

Respondent's claim that the 1939 Amendments clarified that FELA abolished proximate cause is even more farfetched. Those amendments did not modify FELA's negligence or contributory negligence provisions, and indeed did no more than restate the statutory language of section 1 in the new provision abolishing the defense of assumption of the risk where the employee's "injury or death resulted in whole or in part" from the railroad's negligence. 45 U.S.C. § 54. By simply restating the statutory language from section 1, Congress is presumed to have accepted this Court's then ex-

isting gloss on the term (*i.e.*, that it required proximate cause). *Cannon* v. *University of Chi.*, 441 U.S. 677, 698-99 (1979). Because section 1 already connoted proximate cause, the railway union general counsel advised the House committee that it would only add confusion to use different language referring to proximate cause in the amendment. Petr. Br. 33. It is always hazardous to interpret a statute based on the claimed interpretation of a later Congress, *United States* v. *Price*, 361 U.S. 304, 313 (1960), but respondent's imputation that Congress overrode prior interpretations of statutory language by simply restating that language in a new provision is groundless. Regardless, this Court has declared after the 1939 amendments that the jury must still decide whether the carrier's "negligence was the proximate cause of the injury." *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943).

Respondent thus cannot prevail unless *Rogers* silently overruled the 20-odd cases in which this Court had recognized proximate cause as the proper standard under FELA. As an initial matter, there is a heavy presumption against respondent's reading of *Rogers*, given the special force of *stare decisis* in statutory cases, Petr. Br. 40, and given that "this Court does not normally overturn, or ... dramatically limit, earlier authority *sub silentio*." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2003).

NS has shown that *Rogers* did not overrule any of this Court's proximate cause cases, and simply states the test of a jury case when the evidence would permit a jury to find that railroad negligence is one among multiple possible proximate causes of the injury. Petr. Br. 34-42. Even though the jury instruction given in *Rogers* was not contested before or disapproved by this Court, respondent seeks to convert *Rogers* into a holding that forbids juries to be given a proximate-cause instruction. Respondent claims that *Rogers* "definitively" held that FELA does not "require[] proof of proximate causation for a railroad to be liable," Resp. Br. 26-27, but he reaches that conclusion by ignoring what this Court said.

Rogers held that the state court erred in requiring the jury to "exclude the idea that [the employee's] injury was due to causes with which the defendant was not connected," 352 U.S. at 505-06, based on "*language of proximate causation* which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the *sole, efficient, producing cause* of injury." *Id.* at 506 (emphasis added). In *Rogers*, Missouri's antiquated common-law concept of "sole" proximate cause was contrary to the statutory rule rendering railroads liable for injuries resulting "in whole or in part" from railroad negligence, 45 U.S.C. § 51, and to this Court's longstanding rule of "contributory proximate cause," *Coray* v. *Southern Pac. Co.*, 335 U.S. 520, 523 (1949); *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435 (1949). See *Rogers*, 352 U.S. at 506-07 & nn.11, 13, 14 (relying on proximate-cause cases, Petr. Br. 37-39). Respondent's position – that *Rogers* abrogated the "contributory proximate cause" rule under FELA by relying on precedents enforcing that rule and rejecting a contrary state common-law rule of sole proximate cause – makes no sense.

Respondent claims support from the following statement in *Rogers* (which he quotes selectively, Resp. Br. 26):

> The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases.

Rogers, 352 U.S. at 509-10. But the "misconception evidenced in the opinion below," as the Court had just discussed, is that a railroad is only liable if the evidence shows that the railroad's negligence was the sole proximate cause, and excludes any possible finding that the injury "was due to causes with which the defendant was not connected," such as the employee's contributory negligence. *Id.* at 505-06. In a traditional common law action where contributory negligence

was at issue, that would have been the rule: if the defendant's negligence and the plaintiff's negligence both proximately caused the injury, then the defendant was not liable, because contributory negligence was an absolute defense. *See, e.g.*, *McCrowell* v. *Southern Ry.*, 20 S.E.2d 352, 357 (N.C. 1942) (under the common law, "the proximate contributory negligence of the plaintiff, however small the contribution, will bar recovery, and justify the withdrawal of the case from the jury under the single inference rule when the evidence warrants it"); *Curlee* v. *Southern Ry.*, 115 S.E. 628, 630 (S.C. 1923) (same). But a FELA action is significantly different because it abolishes the absolute defense and makes contributory negligence a rule in mitigation of damages, thus making the railroad liable if its negligence causes the injury "in part" even if the employee also contributes in part to the injury. *Rogers*, 352 U.S. at 505-08 & n.12 (quoting 45 U.S.C. § 53, the contributory negligence provision). Congress intended for juries (not courts) to make the determination of whether the employer's negligence played any part in the injury, *id.* at 509-10, and thus the *Rogers* Court "reach[ed] the same conclusion in this case" as it had "[i]n a relatively large percentage of ... cases" that the lower courts had erred in taking away the question of the railroad's liability from the jury. *Id. Rogers* was a case about sufficiency of the evidence under established federal standards; it did not announce a sea change in FELA law by abolishing the settled understanding of proximate cause.

Respondent also misplaces reliance on another passage from *Rogers*, which again he selectively quotes (Br. 26):

> The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.

Rogers, 352 U.S. at 508-09. But respondent ignores the case

that *Rogers* cites in the accompanying footnote 16 to support that proposition: *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943). The quoted sentence from *Rogers* is a paraphrase of the following statement from *Tiller*:

> The Act of 1908 and the amendment of 1939 abolish the [assumption of the risk] ... defenses and authorize comparison of negligence instead of barring the employee from all recovery because of contributory negligence. They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the *proximate cause* of the injury.

Id. at 67 (emphasis added). *Rogers* simply applied that rule to the case where, as it had already determined, the jury had a choice of finding that either railroad or employee negligence proximately caused the injury, 352 U.S. at 503-04; the case could not be taken away from the jury so long as there was evidence from which it could find that the "negligence of the employer played any part, however small, in the injury." *Id.* at 508. This was the established rule in FELA cases – the railroad was liable if its negligence was *a* proximate cause, no matter how slight its contribution relative to other causes – a point that respondent does not contest. Petr. Br. 38-39 (citing cases). *Rogers* broke no new ground, and there is no basis for claiming that it abrogated the settled proximate cause rule.[8]

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[8] It is passing strange that respondent (Br. 35-36) endorses *Egslaer* v. *Scandrett*, 151 F.2d 562 (7th Cir. 1945), as the proper statement of FELA causation. *Egslaer* states exactly the rule that NS says that *Rogers* adopts: namely, that FELA dispenses with "the old concept of proximate cause" as the "direct, *the complete*, the responsible, the efficient cause of the injury," to the exclusion of "[c]ontributing" causes. *Id.* at 565-66 (emphasis added). This is also exactly what the petitioner argued in *Rogers*: vindication of the federal rule of contributory proximate cause, Brief for Petitioner at 4, 9, 19, 24-26, *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) (No. 28), and rejection of Missouri's "old concept of proximate cause," wherein "th[e] cause must have been direct, *the complete*, the responsible, the efficient cause of the injury," *id.* at 25 (emphasis added). Respondent claims that the losing party's rehearing petition supplies the proper gloss on *Rogers*, Resp. Br. 32-33, but the natural inference is that

Respondent fails in his attempt (Br. 27-28) to argue that later cases of this Court embrace his reading of *Rogers* as abrogating proximate cause as the substantive rule on which the jury should be instructed. *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108 (1963), favors NS. In that case, the jury had been instructed it must find proximate cause, and rendered a special verdict "that the injuries to the plaintiff [were] proximately caused by the acts or omissions of the defendant.'" *Id.* at 111 (ellipses omitted). This Court reversed the lower court's grant of a judgment as a matter of law to the defendant, applying the test for the review of sufficiency of the evidence of proximate causation in *Tennant*, which leaves to the jury the resolution of conflicting inferences of causation. *Id.* at 114-15. Importantly, this Court characterized *Rogers* as one of the "[l]ater Federal Employers' Liability Act cases involving sufficiency of the evidence on causation where several explanations are plausible [that] follow the teaching of the *Tennant* case" (*i.e.*, that plausible inferences of proximate cause are for the jury). *Id.* at 115-16. In *Gallick*, there were several competing possible causes of the insect infestation resulting in injury that were unconnected to the railroad (including pollution of the Cuyahoga River by others and "'unsanitary places situated on property not owned or controlled by the railroad,'" *id.* at 112). This Court upheld the jury verdict because the "'the *test of a jury case* is simply whether the proofs justify with reason the conclusion that employer negligence played any part in producing the injury'" even if "'from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes.'" *Id.* at 116-17 (emphasis added and ellipses omitted) (quoting *Rogers*, 352 U.S. at 506-07).[9]

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this Court denied rehearing because its opinion was fully consistent with its proximate-cause precedents.

[9] *Dennis* v. *Denver & Rio Grande W. R.R.*, 375 U.S. 208 (1963) (per curiam), likewise finds sufficiency of the evidence under *Rogers* to support the jury's verdict (pursuant to a proper instruction) that railroad negligence was a proximate cause of the injury, even though "[t]here was also

Just as *Gallick* reaffirmed the *Tennant* proximate-cause holding after *Rogers*, this Court one year after *Rogers* reaffirmed and applied the *Davis* rule that an employer could be liable for a violation of a statutory duty that is "'the proximate cause of the accident'" in a case under the Jones Act (which incorporates FELA). *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 434 (1958) (quoting *Davis*, 263 U.S. at 243). Contrary to respondent's claim (Br. 28-29), this is *Kernan*'s holding, not dicta. The Court held that not only *Davis* but also five other proximate cause precedents stated the rule under FELA and thus under the Jones Act. *Kernan*, 355 U.S. at 432-39 (citing *Coray*, 335 U.S. 520; *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935) (statute "has been liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the act")); *Urie*, 337 U.S. at 195 (same); *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917) (same); *Minneapolis & St. L. R.R.* v. *Gotschall*, 244 U.S. 66 (1917)). In reversing the judgment, this Court held that "the principles governing those cases clearly should apply here." *Kernan*, 355 U.S. at 439.[10]

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evidence from which the jury could reasonably have concluded that petitioner's own negligence was the sole cause of his injury." *Id.* at 210; *cf. id.* at 211 n.* (Douglas, J., dissenting) (quoting proximate cause instruction). *Inman* v. *Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959), is a case about the sufficiency of the evidence of *negligence*, not causation, and simply states the *Rogers* rule consistently with the reading above. Respondent quotes two other cases that refer in passing dicta to a relaxed standard of causation under FELA; those statements are true in that *Rogers* discarded a restrictive common-law concept of sole proximate cause operative in some States, but regardless such dicta could not overrule repeated holdings of this Court that proximate cause is the FELA standard. Petr. Br. 41 n.20.

[10] Respondent's claim (Br. 29-31) that this Court should give *stare decisis* effect to the decisions of the courts of appeals that agree with his reading of *Rogers* is rich with irony, given that he wishes to deny *stare decisis* to this Court's many proximate-cause precedents. Regardless, the premise of respondent's argument is false. The lower courts have not "uniformly recognized" (Resp. Br. 29) that *Rogers* abrogates proximate

There is thus no basis for reading *Rogers* to abrogate this Court's proximate-cause precedents (which were more contemporaneous with the enactment of FELA). Even if, contrary to fact, there were some tension, *Rogers* does not govern simply if it is later in time than certain contrary precedents; this Court must decide which of its precedents is faithful to the statute. *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 276-78 (1994); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 695 (1978).[11] The proper reading of FELA is that a railroad may be held liable for negligence that is a contributory proximate cause of injury, and the same standard applies to contributory negligence in apportioning damages.

CONCLUSION

The judgment should be reversed and the case remanded for a new trial.

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cause; on the contrary, there is a deep conflict of authority on precisely that issue. While most courts of appeals have interpreted *Rogers* in the way Sorrell urges, *see* Pet. Reply 7 & n.4; Resp. Br. 29-31, at least six state supreme courts and the Third Circuit have held that FELA requires proximate cause, Pet. Reply 7 & n.3; *e.g.*, *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("an employee must prove ... that the alleged negligence is a proximate cause of the employee's injury"); *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 674 (Mont. 1991) (same); *cf. Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 450 (1997) (Ginsburg, J., concurring in the judgment in part and dissenting in part) (agreeing with Third Circuit description of a FELA claim with "proximate cause" as one of its elements). Thus, there simply was no uniform rule for congressional silence to ratify, especially in light of contrary precedents of this Court that have never been overruled.

[11] Respondent (Br. 46-47) asks this Court to treat any instructional error as harmless, even though that question is factbound and governed by state law, *see* Mo. Sup. Ct. R. 84.13, and is at best an issue for remand. Regardless, respondent's theory that causal negligence of the driver is *per se* a proximate cause of injury is baseless. If, for instance, the jury found that Woodin drove at Sorrell but that Sorrell reacted improperly, the jury could have declined to find that Sorrell's negligence "directly contributed" to the injury, but may have instead concluded that his negligent positioning of the truck as the other truck approached was the "slightest" [*i.e.*, but-for] cause" of the injury under the standard respondent derives from *Rogers*.

Respectfully submitted,

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September 28, 2006

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No. 05-746

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Missouri

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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TIMOTHY SORRELL,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Missouri

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad

[1] The letter expressing consent has been filed with the Clerk of the Court.

industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. Because FELA litigation is an ongoing event for all major railroads—several thousand FELA suits are filed each year—AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA. In this case, the court below improperly expanded railroad liability under FELA by instructing the jury that a different, more stringent standard of causation applies to employee negligence than applies to employer negligence. This holding, which gives primacy to application of state-approved instructions over federal substantive law, confers a serious and unwarranted disadvantage on railroad defendants in numerous cases arising under FELA.

When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling, by bringing the perspective of an

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[2] *E.g., Illinois Cent. R.R. v. Smallwood*, 125 S.Ct. 1825 (2005); *National R.R. Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. THE COURT BELOW DISCRIMINATED AGAINST FELA DEFENDANTS BY IMPROPERLY ELEVATING STATE-APPROVED INSTRUCTIONS OVER FEDERAL LAW	4
A. Comparative Negligence is a Key Aspect of FELA's Compensation Scheme	6
B. Comparative Negligence Can Have a Great Impact on Damages in FELA Cases	10
C. The Court Below Tipped the Balance Established by Congress When it Enacted FELA	12
D. The Decision Below Disregarded the Rule that Uniform Federal Law Applies in FELA Cases	14
II. WHILE THIS COURT IS NOT ALONE IN PROMOTING UNWARRANTED EXPANSION OF FELA LIABILITY ITS RULING IS PARTICULARLY LIKELY TO HAVE A WIDESPREAD IMPACT ON FELA LITIGATION	15
A. Like the Court Below, Other Lower Courts Have Improperly Promoted FELA Recovery Through Erroneous Interpretations of the Statute	15

TABLE OF CONTENTS—Continued

Page

B. FELA's Venue Provision and Local Practice is Likely to Magnify the Impact of this Case 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES Page

Arellano v. Union Pacific R.R., No. 052-08470 (St. Louis Circuit Ct. 2005) 18
Beeber v. Norfolk Southern Corp., 754 F.Supp. 1364 (N.D. Ind. 1990) 16
Brady v. Southern Ry., 320 U.S. 476 (1943) 4
Butterfield v. Forrester, [K.B. 1809] 11 East 60 ... 7
Cent. of Georgia v. Kelson,505 S.E.2d 803 (Ga. App. 1998) 16
Central Vermont Ry. Co. v. White, 238 U.S. 507 (1915) 5
Chesapeake & Ohio Ry. Co. v. De Atley, 241 U.S. 310 (1916) 8
Clark v. St. Paul & Souix City R.R., 9 N.W. 581 (1881) 7
Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) 7, 8, 16
DeBiasio v. Illinois Cent. R.R., 52 F.3d 678 (7th Cir. 1995) 13
Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) 14
Eichel v. N.Y. Cent. R.R., 375 U.S. 253 (1963) 13
Ellis v. Union Pac. R.R., 329 U.S. 649 (1947) 16
Euton v. Norfolk & Western Ry. Co., 936 S.W.2d 146 (Mo. App. 1997) 17
Farwell v. Boston & Worcester R.R., 4 Metc. 49 (Mass. 1842) 7
Gibson v. Erie Ry. Co., 63 N.Y. 449 (1875) 7
Gish v. CSX Transp., Inc., 890 F.2d 989 (7th Cir. 1989) 10
Harris v. Illinois Cent. R.R., 58 F.3d 1140 (6th Cir. 1995) 11
Hayes v. Union Pac. R.R., No. 012-09799 (St. Louis Circuit Ct. 2005) 19

TABLE OF AUTHORITIES—Continued

	Page
Higgins v. CSX Transp., Inc., 455 S.E.2d 129 (Ga. App. 1995)	10
Howard v. Illinois Cent. R.R., 207 U.S. 463 (1908)	7
Inman v. Baltimore & Ohio R.R., 361 U.S. 138 (1959)	16
Jenkins v. Union Pac. R.R., 22 F.3d 206 (9th Cir. 1994)	10
Kansas City Southern Ry. Co. v. Giddens, 29 S.W.3d 813 (Mo. 200), *cert. denied*, 532 U.S. 990 (2001)	13
Louisville, Nashville & Great Southern R.R. v. Fleming, 82 Tenn. 128 (Tenn. 1884)	7
Mitchell v. Missouri-Kansas-Texas R.R., 786 S.W.2d 659 (Tex. 1990)	16
New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917)	14
Nidlinger v. Norfolk Southern R.R., No. 032-1596 (St. Louis Circuit Ct. 2005)	18
Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135 (2003)	8, 12
Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980)	14
Plembeck v. Union Pac. R.R., 441 N.W.2d 614 (Neb. 1989)	11
Pry v. Alton & Southern Ry. Co., 598 N.E.2d 484 (Ill. App. 1992)	16
Schirra v. Delaware, L. & W. R.R., 103 F.Supp. 812 (M.D. Pa. 1952)	13
Schneider v. National R.R. Passenger Corp., 987 F.2d 132 (2d Cir. 1993)	13
Second Employers' Liability Cases, 223 U.S. 1 (1912)	7

TABLE OF AUTHORITIES—Continued

Page

Shepherd v. Metro-North Comm. R.R., 791 F. Supp. 1008 (S.D.N.Y. 1992) 11
Smith v. Union Pac. R.R., No. 042-01921 (St. Louis Circuit Ct. 2005) 18
South Buffalo Ry. Co. v. Ahern, 344 U.S. 367 (1953) 14
State ex rel. Kansas City Southern Ry. Co.,998 S.W.2d 185 (Mo. App. 1999) 18
State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001) 18
St. L..Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985) 14, 15
Syverson v. Consolidated Rail Corp., 19 F.3d 824 (2nd Cir. 1994) 16
Taylor v. Burlington Northern R.R., 787 F.2d 1309 (9th Cir. 1986) 9
Taylor v. Illinois Cent. R.R., 8 F.3d 584 (7th Cir. 1993) 11
Thorn v. Norfolk Southern Ry. Co., No. 012-09998 (St. Louis Circuit Ct. 2003) 18
Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943) 8, 9
Uhrhan v. Union Pac. R.R., 617 N.E.2d 1182 (Ill. 1993) 11
Urie v. Thompson, 337 U.S. 163 (1949) 12, 14
Walsh v. Consolidated Rail Corp., 937 F.Supp. 380 (E.D. Pa. 1996) 16
Williams v. Long Island R.R., 196 F.3d 402 (2nd Cir. 1999) 16
Wood v. Norfolk Southern Ry. Co., No. 042-01171 (St. Louis Circuit Ct. 2005) 18
Zarrow-Smith v. *New Jersey Transit Rail Operations, Inc.*, 953 F.Supp. 581 (D. N.J. 1997) 10

TABLE OF AUTHORITIES—Continued

STATUTES — Page

Act of Aug. 11, 1939, c. 685, 53 Stat. 1404 9
28 U.S.C. §1445(a) 17
Federal Employers' Liability Act
45 U.S.C. §§51-60 2
45 U.S.C. §53 8
45 U.S.C. §56 17
45 U.S.C. §231a(a) 13
Jones Act, 46 U.S.C. §688 6

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Hearing to Receive Testimony on the Federal Employers' Liability Act (FELA) in Relation to Amtrak, Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation, 100th Cong. (1988) 9
PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE (1998) 6
Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L. & Econ. 305 (1998) .. 6

IN THE

Supreme Court of the United States

No. 05-746

NORFOLK SOUTHERN RAILWAY COMPANY
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Missouri

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

before Congress, administrative agencies and the courts on behalf of the railroad industry.

One such matter is the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, a 95 years old negligence statute under which railroad employees who are injured on the job may seek compensation from the employing railroad. FELA presents unique issues and problems for railroads as it differs fundamentally from the compensation systems covering virtually all other U.S. industries: subsequent to FELA's enactment, every state enacted a workers' compensation law, under which the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation. Despite the advent of workers' compensation, FELA remains intact, and each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads. All told, the railroads spend close to a billion dollars annually in the payment and defense of claims brought under FELA. Thus, FELA litigation is an ongoing event for all major railroads, to which they devote substantial legal and financial resources.

In this case, the trial court improperly instructed the jury on the issue of comparative negligence and in so doing denied the defendant railroad one of its key rights under FELA. In upholding the rote application of state-approved jury instructions, the court below ignored (1) the principle that in interpreting FELA state law must yield to federal law; and (2) decisions of this and other courts on the substantive issue of comparative negligence, one of the most important features of FELA. Because jury awards under FELA must be reduced in proportion to the employee's contributory negligence, failure properly to instruct on this issue can have significant impact on a FELA defendant's obligation to pay damages. This error was compounded by the court's additional ruling which makes judicial review of the jury's assessment of the

employee's negligence virtually impossible. Since AAR's largest members, and numerous other railroads, operate in Missouri, and, because it is easy to bring and maintain out-of-state cases in Missouri courts, this case is of utmost interest to AAR and its members.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

By instructing the jury that a different standard of causation applies to employee negligence than to employer negligence, and by prohibiting the jury from recording its finding on contributory negligence, the court below improperly elevated state-approved instructions over established federal law. This ruling discriminates against FELA defendants with respect to a key aspect of FELA: the right to have damages reduced in proportion to the plaintiff's contributory negligence. A vestige of an earlier era that is at odds with the principles embodied in modern workers' compensation systems, FELA makes each party responsible to the extent its negligence causes a workplace injury. While several features of FELA are designed to promote recovery, its comparative negligence regime can, and often does, mitigate the defendant's obligation to pay damages.

The state-approved instructions utilized below are contrary to established precedent and undermine the principle that FELA litigants are entitled to uniform application of the statute nationwide. This case is of concern to railroads because it vitiates what often is the most viable defense available to them and upsets the balance established by Congress in crafting FELA as a compensation system for the railroad industry. Moreover, this is not merely a local matter. FELA's venue provision is very broad, permitting suits to be filed in jurisdictions that have little nexus to the case. The court below has become a magnet for such filings, and is notorious for

routinely denying *forum non conveniens* motions no matter how tenuous the connection between the jurisdiction and the underlying claim.

ARGUMENT

I. THE COURT BELOW DISCRIMINATED AGAINST FELA DEFENDANTS BY IMPROPERLY ELEVATING STATE-APPROVED INSTRUCTIONS OVER FEDERAL LAW

Wedded to form, state-approved instructions, the court below incorrectly charged the jury on a key aspect of this case, violating a fundamental principle that FELA litigants are entitled to "receive similar treatment in all states." *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943). In this case, a railroad employee who was injured on the job brought a FELA suit alleging the employing railroad negligently caused his injury. In its defense, the railroad contended that the employee's negligent conduct caused, or at least contributed to, the accident. Pet. at 4-5. Though the underlying facts may vary, this scenario is typical of many cases that are litigated every year between railroads and their employees under this unique federal law. As is often the case, the jury was called upon to determine whether the railroad and/or the employee were negligent, and assess the extent to which the negligence of both parties, if any, was responsible for causing the injury.

Rather than instructing the jury that the same causation standard applies with regard to both the employer's negligence and the employee's contributory negligence—a well-established point of federal law—the trial court's instructions set forth different standards. The instructions given by the court called for a more exacting standard of causation when assessing the employee's negligence, imposing a heavier burden on the railroad than on the employee.[2] This error was

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[2] Just as the burden of proof for showing employer negligence is on a FELA plaintiff, the burden of proving employee contributory negligence

compounded when the trial court, again utilizing state-approved instructions, did not allow the jury to specify whether it found the employee to have been contributorily negligent, and, if so, in what proportion. Instead, the court's instructions and general verdict advised the jury to calculate gross damages and to reduce those damages by the plaintiff's percentage of fault, without recording those finding on the verdict form. This practice is inconsistent with FELA and impermissibly discriminates against FELA defendants inasmuch as Missouri law requires the jury to write its findings of comparative fault in all other negligence actions.

As petitioner demonstrates, invoking divergent standards of causation for employer and employee negligence in FELA cases is both contrary to precedent of this Court, and impractical in application. Pet. at 10-12.[3] Similarly, the failure to require a special verdict on contributory negligence also is contrary to established precedent and practice. Pet. at 20-21. This denial of petitioner's ability to vindicate its rights under FELA is of no small consequence, either to petitioner in this case, or to the railroad industry as a whole. The jury in this case returned a verdict of $1.5 million. Because there was clear evidence of contributory negligence, the manner in which the jury assessed that issue had potentially significant monetary consequences: for example, a finding that the plaintiff's negligence was 50% responsible for the injury would have reduced the verdict by $750,000. Given the frequency with which contributory negligence is an issue in FELA cases, and the potential for verdicts of six, and even seven,

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is on the defendant. *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 512 (1915).

[3] Petitioner also shows that the Missouri instructions on contributory negligence conflict with the decisions of several federal courts of appeals and state supreme courts. Pet. at 13-14.

figures,[4] other railroads could soon find themselves in a similar situation.

A. Comparative Negligence is a Key Aspect of FELA's Compensation Scheme

The nature and structure of FELA elevate the issue of contributory negligence to one of great importance, making it essential that courts properly instruct juries on this issue. FELA establishes a compensation system that differs fundamentally from those that cover virtually all other American workers (and, in fact, workers throughout the world).[5] In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA as a tort-based remedy for railroad employees injured on the job, who, at that time, had little legal recourse. This was an era when working in the railroad industry was undoubtedly hazardous, and resulted in a great human toll.[6] Moreover, the common law of negligence had erected a num-

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[4] From 2000 through 2004, there were 56 FELA verdicts in excess of $1 million.

[5] Other than railroads, and the maritime industry, to which the substance of FELA applies by virtue of the Jones Act, 46 U.S.C. §688, all industries in the United States are covered by either state or federal no-fault workers' compensation systems. Most states enacted workers' compensation laws of general application between 1910 and 1920; by 1930 all but four states had enacted a workers' compensation law, with Mississippi being the last in 1948. Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 319-20 (1998). No-fault workers' compensation is the prevailing model worldwide today. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 14 (1998).

[6] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87, 644 were injured. Interstate Commerce Commission, *Statistics of Railways in the United States 1908* 41, 99 (1909).

ber of often insurmountable barriers as obstacles to recovery for injuries sustained by workers.[7]

Against this backdrop, and with the goal of providing a progressive and meaningful remedy, Congress enacted FELA, initially in 1906, and, after addressing constitutional flaws in the original statute, again in 1908.[8] Through FELA, Congress sought to address the perils posed by railroad employment and to provide compensation to employees who suffered injury or death as a result of their employer's negligence. *See Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 542 (1994).

When it enacted FELA, Congress adopted what was at the time the universal compensation model in the United States: the law of negligence. The policy embodied in FELA was that railroads were to be liable in damages for injuries sustained by employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad. To ameliorate the harsh results which often were a

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[7] For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Souix City R.R.*, 9 N.W. 581 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842). The rule that contributory negligence by the plaintiff barred recovery even if the defendant was at fault traced back to English common law, *Butterfield v. Forrester*, [K.B. 1809] 11 East 60, and was the prevailing rule in the United States in the nineteenth century. *E.g., Louisville, Nashville & Great Southern R.R. v. Fleming*, 82 Tenn. 128 (Tenn. 1884)("In England and a majority of the States of the Union, the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action.")

[8] *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908); *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

consequence of prevailing legal doctrine, Congress modified some aspects of the existing common law in an effort to promote recovery. *See Gottshall,* 512 U.S. at 542-43. For example, the fellow servant rule, which absolved the employer of responsibility to provide compensation where the injury was the consequence of the negligence of another employee, was eliminated. *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) ("Congress . . . abrogated the common law rule known as the fellow servant doctrine by placing the negligence of a coemployee upon the same basis as the negligence of the employer.")

Significantly, FELA was an early example of a comparative fault statute, at the time a significant innovation in tort law. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003). ("Among [FELA's] innovations, the Act expressly directs apportionment of responsibility between employer and employee based on comparative fault." *Id.* at 161.) Rather than barring any recovery if the employee's negligence contributed to the injury—the prevailing rule at the time—under FELA damages were only to be reduced in proportion to the employee's negligence. 45 U.S.C. §53. This opened the opportunity for recovery in many instances where it previously would have been denied. However, the efficacy of the comparative fault rule was somewhat diluted because, other than in cases where a safety statute was violated, the doctrine of assumption of the risk remained a viable defense for the first three decades after FELA's enactment. *See Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 62-64 (1943) on the difficulty courts had distinguishing contributory negligence from assumption of the risk, with railroads often arguing that the employee's conduct constituted the latter.[9]

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[9] One court described the difference between the two concepts as follows:

> An employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties consti-

In 1939, Congress disposed of this concern by eliminating the assumption of the risk defense in all FELA cases. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404, thereby "making the principles of comparative negligence the guiding rules of decision in accident cases." *Tiller*, 318 U.S. at 65. As this Court explained, FELA "permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned." *Id.*

Thus, Congress struck a balance, requiring that each party bear the consequences of its own negligence. See Pet. at 3. This contrasts with the workers' compensation systems under which "negligence and fault are largely immaterial, [ ] in the sense that the employee's contributory negligence does not lessen his or her rights . . ."[10] In holding employees responsible for their own negligent conduct FELA may indeed conflict with the prevailing concepts of addressing workplace injuries, but it is the system Congress has chosen to adopt for workplace injuries in the railroad industry. Railroad employee representatives acknowledge and accept this aspect of FELA. *See Hearing to Receive Testimony on the Federal Employers' Liability Act (FELA) in Relation to Amtrak, Before the Subcomm. on Surface Transportation of the Senate*

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tutes assumption of the risk. Contributory negligence, in contrast, is a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist.

Taylor v. Burlington Northern R.R., 787 F.2d 1309, 1316 (9th Cir. 1986).

[10] A. Larson & K. Larson, *Larson's Workers' Compensation Law* §1.01 (2004 ed.) "Misconduct of the employee, whether negligent or wilful is immaterial . . . unless it takes the form of deviation from the course of employment, or unless it is of a kind specifically made a defense in the jurisdiction containing such a defense in their statute." *Id.* at Ch. 32. Some statutory exceptions to the general rule that contributory negligence does not serve to reduce or eliminate the right to benefits are self-injury, intoxication, or wilful misconduct by the employee. *Id.* at §32.01.

Comm. on Commerce, Science and Transportation, 100th Cong. 98 (1988) (statement of Fred A. Hardin, President, United Transportation Union)("If the railroad can prove that we caused the accident ourselves, we were negligent, then I do not think the railroad owes us anything.")

B. Comparative Negligence Can Have a Great Impact on Damages in FELA Cases

The ability to reduce damages in proportion to an employee's contributory negligence is a key aspect of FELA, and often is the most viable means of defending a FELA claim. Numerous scenarios can give rise to a comparative negligence defense. "[W]hen an employee carries out his supervisor's general orders in an unsafe manner, he is responsible under FELA for his own contributory negligence." *Jenkins v. Union Pac. R.R.*, 22 F.3d 206, 211 (9th Cir. 1994). For example, when an employee injured his back while attempting to move a 150 pound manhole cover by himself, the jury's finding that he was 50% negligent for failing to seek help or to use a safer method was affirmed. *Gish v. CSX Transp., Inc.*, 890 F.2d 989 (7th Cir. 1989). Another employee was found to be 50% negligent when "electing to position himself directly under the primary source of peril, [he] engaged in a voluntary act which added new danger . . . to the employer permitted conditions of the work area." *Higgins v. CSX Transp., Inc.*, 455 S.E.2d 129, 131 (Ga. App. 1995). Even an employee's behavior outside of the workplace may be considered contributory negligence. *Zarrow-Smith* v. *New Jersey Transit Rail Operations, Inc.*, 953 F.Supp. 581 (D. N.J. 1997)(Where employee claimed her lung cancer was the result of exposure to asbestos on the job, the employee's smoking could be considered contributory negligence.)

FELA places an obligation on railroad employees to work safely and obey applicable railroad safety rules, and the failure to obey safety rules may be considered contributory

negligence. *E.g., Plembeck v. Union Pac. R.R.*, 441 N.W.2d 614 (Neb. 1989). In *Uhrhan v. Union Pac. R.R.*, 617 N.E.2d 1182 (Ill. 1993), the Illinois Supreme Court found that evidence that plaintiff did not comply with railroad safety rule requiring that employees watch for tripping hazards when walking in rail yards warranted an instruction on contributory negligence. (Reversing Appellate Court and affirming 40% reduction in damages for contributory negligence.) In another case, the court held that a plaintiff who was injured while stepping off of a rail car had "a duty to look carefully, and failure to do so would have been negligent." *Harris v. Illinois Cent. R.R.*, 58 F.3d 1140, 1144 (6th Cir. 1995) (Granting a new trial due to failure to instruct jury on contributory negligence.)

A finding of contributory negligence can serve substantially to reduce a railroad's liability. *Shepherd v. Metro-North Comm. R.R.*, 791 F. Supp. 1008 (S.D.N.Y. 1992)(Evidence supported a jury finding that plaintiff's negligence was 90% the cause of the injury.); *Plembeck*, 441 N.W.2d at 618 (Affirming jury finding that employee was 90% negligent.) In fact, an employee's negligence can completely bar recovery if the jury finds that it was the sole cause of the injury. *E.g., Taylor v. Illinois Cent. R.R.*, 8 F.3d 584 (7th Cir. 1993) (Approving instruction that "contributory negligence" means "negligence on the part of the plaintiff that contributed in whole or in part to the alleged injury." *Id.* at 586.)

Not only did the court below erroneously charge the jury on the issue of comparative negligence, another local rule applied by the court in this case made it virtually impossible for the parties to obtain meaningful review on that important issue. As petitioner demonstrates, in cases where evidence of contributory negligence has been presented the practice of instructing juries not to reveal whether and in what amount they found contributory negligence is inconsistent with federal law. Pet. at 20-21. This application of local practice,

which in this case treated FELA cases differently from other cases filed in the state's courts, patently discriminates against railroad FELA defendants.

C. The Court Below Tipped the Balance Established by Congress When it Enacted FELA

By applying a more exacting standard on FELA defendants for proving causation with regard to employee negligence, the court below undermined the scheme established by Congress. Although FELA liability is based on a showing of common law negligence on the part of the railroad, *Urie v. Thompson*, 337 U.S. 163, 182 (1949), a number of features of FELA, both set forth in the statute, and judicially construed, have eased the path toward collecting damages from railroads. Common law defenses have been eliminated. *See supra* pp. 7-8. In addition, regardless of how many joint tortfeasors may be responsible for the injury, if the railroad's negligence played even a small role in causing the injury a FELA plaintiff may collect full damages from the railroad defendant. *Ayers*.[11]

Moreover, once a FELA plaintiff clears the hurdle of proving that the employer's fault caused his or her injury, FELA contains no caps or limitations on the amount of damages that may be recovered.[12] In FELA cases, juries typically are given wide discretion to make determinations of fact, including

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[11] In *Ayers*, a FELA plaintiff who alleged an asbestos-related illness and testified that he may have been exposed to asbestos at his railroad job for three months was permitted to collect full damages from the railroad even though he had also been exposed to asbestos during the 33 years he was employed as a pipefitter outside the rail industry.

[12] This is another fundamental difference between FELA and workers' compensation statutes. Typically, workers' compensation benefits are capped: "[t]he amount of compensation for disability depends on the worker's previous earning level, for most acts award a percentage of average wage, somewhere between a half and two-thirds. But practically all acts also set a maximum in terms of dollars per week." Larson at § 1.03[5].

questions about the extent of damages suffered. *Schirra v. Delaware, L. & W. R.R.*, 103 F.Supp. 812, 823 (M.D. Pa. 1952)("[T]he jury would be justified in awarding plaintiff a substantial sum of money to fairly compensate him for past and future pain, suffering and inconvenience, and the amount to be awarded is peculiarly within the discretion of the jury, provided it is within reason.") A compensatory damages award under FELA will be deemed excessive only if it "shock[s the] judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993) ($1.75 million verdict, including over $1 million in intangible damages, not excessive). Thus, large awards, while not the norm, are not uncommon. *E.g., DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678 (7th Cir. 1995)($4.2 million award affirmed). In fact, St. Louis, the jurisdiction where this case was tried, has recently produced astounding eight-figure FELA verdicts. *See Infra* pp. 18-19.

In addition to being able to collect uncapped damages, many FELA plaintiffs also are entitled to disability benefits under the Railroad Retirement Act as compensation for their work-related injuries. 45 U.S.C. §231a(a). With near unanimity, courts have precluded this fact from being made known to the jury or to be used to offset FELA damages.[13] Thus, proving comparative negligence often is the only viable means for mitigating FELA damage awards. However, the ruling below tips the balance even further in favor of recovery by FELA plaintiffs in a manner that is completely unwarranted.

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[13] These rulings are primarily the result of an expansive reading of dicta in *Eichel v. N.Y. Cent. R.R.*, 375 U.S. 253 (1963). The railroad industry has urged this Court to clarify or reconsider *Eichel*, as it has been interpreted to enable many rail employees to collect dual benefits, both funded by the employer, for the same injury. *E.g. Kansas City Southern Ry. Co. v. Giddens*, 29 S.W.3d 813 (Mo. 2000), *cert. denied*, 532 U.S. 990 (2001).

D. The Decision Below Disregarded the Rule that Uniform Federal Law Applies in FELA Cases

Beyond the circular reasoning that the instructions given in this case were proper because they are part of the Missouri Approved Instructions, the court below articulated no rationale for mandating divergent causation standards in FELA cases. Certainly, the court paid no heed to the long-standing FELA principle that matters of substance are questions of federal law. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980); *Urie*. On this, the precedent of this Court could not be more clear. A fundamental aim of FELA's enactment was to promote national uniformity by removing the subject of compensation for workplace injuries in the railroad industry from being subject to the vagaries of state law. *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367 (1953)(FELA "supplant[s] a patchwork of state legislation with a nationwide uniform system . . ." *Id.* at 371). FELA "create[s] uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states." *New York Cent. R.R. v. Winfield* , 244 U.S. 147, 150 (1917). *See also Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952)("State laws are not controlling in determining what the incidents of this federal right shall be." *Id.* at 361.)

Consistent with this principle, this Court has ruled that states may not justify jury instructions that misstate the law in FELA cases on the grounds that they are part of the state's approved instructions. *St. L. Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). In *Dickerson*, this Court rejected the Missouri court's refusal to given a correct instruction on the proper measure of damages—in that case the need for the jury to reduce a damage award to present value—because such an instruction was not part of the Missouri Approved Instructions. This Court held that federal law addressed the

subject of present value (an aspect of damages), and that the Missouri court was obligated to apply that law, its approved instructions notwithstanding.

As in *Dickerson*, in this case too "existing law provides a clear answer" on the substantive question at issue that is at odds with the Missouri Approved Instructions. See Pet. at 9-14. Therefore, it is of no moment whether, as the court below stated, the instruction given in this case "was the correct instruction" under Missouri law.

II. WHILE THIS COURT IS NOT ALONE IN PROMOTING UNWARRANTED EXPANSION OF FELA LIABILITY ITS RULING IS PARTICULARLY LIKELY TO HAVE A WIDESPREAD IMPACT ON FELA LITIGATION

A. Like the Court Below, Other Lower Courts Have Improperly Promoted FELA Recovery Through Erroneous Interpretations of the Statute

The case below is not an isolated result; rather it is representative of a problem that pervades FELA jurisprudence. First, it is but one example of a tendency among lower courts to rely on local rules, or their own notions of how FELA should be interpreted, improperly to expand railroad liability. Second, FELA facilitates practices that can greatly magnify the impact of such erroneous local rulings, a result particularly likely here.

Like the court below, some courts have construed FELA to further facilitate a plaintiff's ability to recover damages by eviscerating the principles of negligence on which the statute is based, thereby moving FELA closer to being a workers' compensation law and railroads closer to being insurers of their employees' health and safety, in disregard of the words

of the statute and prior precedent.[14] For example, some courts have held that FELA establishes a standard of care that differs qualitatively from ordinary negligence, that of "slight" negligence. *Beeber v. Norfolk Southern Corp.*, 754 F.Supp. 1364, 1372 (N.D. Ind. 1990)("If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable."); *Walsh v. Consolidated Rail Corp.*, 937 F.Supp. 380, 382 (E.D. Pa. 1996)("FELA imposes a stringent duty of care. 'Slight negligence necessary to support a FELA action, is defined as a failure to exercise *great* care . . .'"); *Pry v. Alton & Southern Ry. Co.*, 598 N.E.2d 484, 499 (Ill. App. 1992)(Under FELA "[o]nly slight negligence of the defendant needs to be proved . . "). *See also Williams v. Long Island R.R.*, 196 F.3d 402 (2nd Cir. 1999)(The Second Circuit construes FELA "as creating a relaxed standard for negligence and causation." *Id.* at 406); *Cent. of Georgia v. Kelson*, 505 S.E.2d 803, 808 (Ga. App. 1998)(Only slight negligence, defined as a failure to exercise *great* care, is necessary to support a FELA action.).

Some courts have found other ways to facilitate recovery. *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2nd Cir. 1994)(Holding that "under FELA and the case law construing it, the common-law negligence standards of foreseeability and causation normally applied in summary judgment are substantially diluted." *Id.* at 825); *Mitchell v. Missouri-Kansas-Texas R.R.*, 786 S.W.2d 659 (Tex. 1990)("Foreseeability is thus not part of the causation standard as to negligence in FELA cases." *Id.* at 661). In a similar vein, the court below advanced a recovery-promoting interpretation of FELA that finds no warrant in the statute or controlling precedent.

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[14] *See Gottshall*, 532 U.S. at 543; *Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947)

B. FELA's Venue Provision and Local Practice is Likely to Magnify the Impact of this Case

Even though this case involves erroneous instructions used in only one state, it can have a significant impact on the adjudication of FELA claims. To begin, because the Missouri Approved Instructions are used in all FELA cases in Missouri courts, there is the potential for significant error in every such case. Missouri is a state with significant railroad activity. Seventeen freight railroads operate in Missouri, over 4,122 miles of track. Missouri is the home to nearly 8,000 rail employees.

Not only is Missouri an important railroad state, but rulings of Missouri courts can impact FELA cases arising far beyond its borders. FELA suits may be brought wherever the railroad is doing business, 45 U.S.C. §56, which as an initial matter gives plaintiffs wide latitude in choosing where to bring a lawsuit. Moreover, a FELA case brought in state court, often the preferred venue for plaintiffs, may not be removed to federal court. 28 U.S.C. §1445(a). The 17 railroads operating in Missouri include the four largest in the nation. Thus, FELA suits arising from accidents which occur on parts of their systems distant from Missouri can easily find there way into that state.

Not only does FELA's broad venue provision allow plaintiffs to choose from among a wide range of forums, once a case is filed, it is relatively easy to keep it in the selected forum. Missouri venues are a case in point. To keep FELA cases in St. Louis, a jurisdiction perceived to be plaintiff-friendly, plaintiffs have resorted to the tactic of retaining a St. Louis doctor to "treat" them. This will usually be enough to defeat a *forum non conveniens* motion even if the plaintiff neither lives nor was allegedly injured in Missouri. *E.g., Euton v. Norfolk & Western Ry. Co.*, 936 S.W.2d 146 (Mo. App. 1997)("The fact that [plaintiff's] treating physician practiced in St. Louis" was sufficient to defeat *forum non*

conveniens motion "[e]ven though most of the events took place outside the state of Missouri." *Id.* at 154)[15] In fact, "it appears that no Missouri appellate court has ever issued a writ directing a trial court to dismiss a case on grounds of *forum non conveniens*. *State ex rel. Kansas City Southern Ry. Co.*, 998 S.W.2d 185, 191 (Mo. App. 1999).

It is no surprise that numerous out-of-state FELA cases, like this case, are brought in Missouri, and in St. Louis in particular.[16] Along with Madison County, Illinois, the City of St. Louis was recently recognized as one of the select few jurisdictions that are "plaintiff-friendly courts" with "eye-popping jury awards." *Civil Wars*, NEWSWEEK, Dec. 15, 2003, at 43 & 48. This has already resulted in what has been described as the "tremendously disproportionate burden carried by the citizens of St. Louis who are called to jury service." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 860 (Mo. banc 2001) (Wolff J., concurring in part and dissenting in part)(noting that the preponderance of the anecdotal evidence is that St. Louis juries are far more favorably disposed toward injured plaintiffs than juries from other parts of the state.) This concern was underscored by two recent St. Louis verdicts. In one case a jury awarded $17 million to a conductor who fell while descending from a rail car. *Nidlinger v. Norfolk Southern R.R.*, No. 032-1596 (St. Louis

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[15] *See also Arellano v. Union Pacific R.R.*, No. 052-08470 (2005) (Plaintiff resides and alleges injury in Kansas); *Wood v. Norfolk Southern Ry. Co.*, No. 042-01171 (2005) (Plaintiff resides and alleges injury in Ohio); *Smith v. Union Pacific R.R.*, No. 042-01921(2005)(Plaintiff resides Louisiana; no fact witnesses in Missouri); *Thorn v. Norfolk Southern Ry. Co.*, No. 012-09998 (2003)(Plaintiff resides and alleges injury in Michigan); In each of these cases, all tried in the Twenty-Second Judicial Circuit Court, St. Louis, the railroads' *forum non conveniens* motion was denied, with the plaintiffs' receipt of medical treatment in St. Louis cited as a factor.

[16] In this case, the accident occurred in Indiana and the plaintiff was from Indiana. See Pet. at 17.

Circuit Ct. 2005). In another case, the jury awarded $12 million to an employee who slipped on a wet floor. *Hayes v. Union Pac. R.R.*, No. 012-09799 (St. Louis Circuit Ct. 2005). The stakes in requiring state courts to adhere to proper and established interpretations of FELA could not be higher for the railroads.

A grant of the petition, or summary reversal, an alternative suggested by petitioner, would, in addition to addressing the errors below, remind lower courts of the need to adhere strictly to the text of FELA and to this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, or, in the alternative, this Court should consider summarily reversing the decision below.

Respectfully submitted,

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240

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No. 05-746

IN THE
SUPREME COURT OF THE UNITED STATES

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Writ of Certiorari to the
Missouri Court of Appeals

BRIEF OF *AMICI CURIAE* AMERICAN TRAIN DISPATCHERS ASSOCIATION, BROTHERHOOD OF LOCOMOTIVE ENGINEERS & TRAINMEN, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS & BLACKSMITHS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, NATIONAL CONFERENCE OF FIREMEN & OILERS, TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION AND UNITED TRANSPORTATION UNION, BROTHERHOOD OF RAILROAD SIGNALMEN IN SUPPORT OF RESPONDENT TIMOTHY SORRELL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT 5

I. CONGRESS IS THE PROPER VENUE FOR THE RELIEF PETITIONER SEEKS..... 5

II. BECAUSE PETITIONER EFFECTIVELY CONCEDED THE QUESTION UPON WHICH CERTIORARI WAS GRANTED AND ABRUPTLY CHANGED THE ARGUMENT TO ONE NEVER RAISED IN THE COURTS BELOW PETITIONER ASKS THIS COURT FOR AN ADVISORY OPINION..... 9

III. BY EFFECTIVELY CONCEDING THE ISSUE RAISED IN THE LOWER COURTS AND THE PETITION FOR CERTIORARI PETITIONER HAS RENDERED ITS CLAIM MOOT..... 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases: **Page**

Adams v. Robertson,
520 U.S. 83 (1997) (*per curiam*). 9

Adarand Constructors, Inc. v. Mineta,
534 U.S. 105 (2001). 8, 11, 12

City News and Novelty v. City of Waukesha,
531 U.S. 278 (2001). 12

Daimler Chrysler Corp. v. Cuno, ___ U.S. ___,
126 S.Ct. 1854 (2006). 10

Fletcher v. Union Pac. R.R. Co.,
621 F.2d 902 (8th Cir. 1980). 7

Gautreaux v. Scurlock Marine, Inc.,
107 F.3d 331 (5th Cir. 1997) (en banc). 6

Green v. River Terminal Ry. Co.,
763 F.2d 805 (6th Cir. 1985). 7

Hamdan v. Rumsfeld,
___ U.S. ___, 126 S.Ct. 2749 (2006)..... 8

Hernandez v. Trawler Miss Vertie Mae, Inc.,
187 F.3d 432 (4th Cir. 1999)..... 6

Hines v. Consol. Rail Corp.,
926 F.2d 262 (3d Cir. 1991)..... 6

Holbrook v. Norfolk S. Ry. Co.,
414 F.3d 739 (7th Cir. 2005)..... 7

Napier v. F/V DEESIE, Inc.,
454 F.3d 61 (1st Cir. 2006)..... 6

North Carolina v. Rice,
404 U.S. 244 (1971)..... 9, 11

Oglesby v. S. Pac. Transp. Co.,
6 F.3d 603 (9th Cir. 1993)..... 7

Patterson v. McLean Credit Union,
491 U.S. 164 (1989)..... 8

Preiser v. Newkirk,
422 U.S. 395 (1975)..... 12

Raines v. Byrd,
521 U.S. 811 (1997)..... 10

Richards v. Consol. Rail Corp.,
330 F.3d 428 (6th Cir. 2003)..... 7

Rogers v. Missouri Pacific Railroad Co.,
352 U.S. 500, (1957)..... 6

Shepard v. United States,
544 U.S. 13 (2005)..... 8

Summers v. Mo. Pac. R.R. Sys.,
132 F.3d 599 (10th Cir. 1997)..... 6

Syverson v. Consol. Rail Corp.,
19 F.3d 824 (2d Cir. 1994)..... 6

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978)..... 7

Turner Broadcasting System Inc. v. Federal Comm. Commission, 520 U.S. 180 (1997)..... 7

U.S. v. National Treasury Employees Union,
513 U.S. 454 (1995)..... 7

Vance v. Bradley,
440 U.S. 93 (1979) 7

Constitutional Provisions:

U.S. CONST. Art. III, § 2 ..... *passim*

Statutes:

45 U.S.C. §§51-60 ..... *passim*

Miscellaneous:

Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826 (Henry P. Johnston ed., 1890) 8, 11

INTEREST OF THE *AMICI CURIAE*[1]

The American Train Dispatchers Association (ATDA), Brotherhood of Locomotive Engineers and Trainmen (BLET), Brotherhood of Maintenance of Way Employees (BMWE), International Brotherhood of Boilermakers and Blacksmiths (IBBB), International Brotherhood of Electrical Workers (IBEW), National Conference of Firemen and Oilers (NCFO), Transportation Communications International Union (TCIU), United Transportation Union (UTU), and Brotherhood of Railroad Signalmen (BRS) ("Rail Labor Coalition") are employee associations and labor unions organized under the Railway Labor Act, 45 U.S.C. §151 et seq. ATDA is the collective bargaining representative for the craft of train dispatchers; BLET, locomotive engineers; BMWE, way employees; IBBB, boilermakers; IBEW, mechanical and communications electricians; NCFO, roundhouse and mechanical shop laborers; TCIU, clerical employees and carmen; UTU, conductors and other train service employees; and BRS, signalmen. Petitioner and Respondent have consented to the Rail Labor Coalition's filing of a brief.

Most of the members of the Rail Labor Coalition represent the employees on all of the nation's major freight railroads, Amtrak and many of the regional and short line railroads. Some of them and their predecessors have existed since 1863 and most existed when the Federal Employers'

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[1] No person or entity other than *Amici Curiae* unions have made any monetary contribution towards this brief, and no counsel for any party authored this brief in whole or in part.

Liability Act (FELA), was enacted in 1908. Together, they represent well over 90% of the workers employed by the railroad industry and, separately or joined as here, have frequently appeared before Congress, administrative agencies such as the Federal Railroad Administration and the National Transportation Safety Board, and the courts on matters important to rail labor. Coalition members have participated in past FELA cases before this Court, such as *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003).

In virtually every congressional session during the past decade or two, Rail Labor Coalition members have been forced to resist lobbying efforts by the railroad industry to abolish or weaken FELA. For over 50 years, these efforts have failed and the 100-year-old Act has remained unchanged.

One of the major purposes of FELA was the promotion of safety within the railroad industry. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329-30 (1958). In light of the safety purposes of the statute, the Court has recognized that FELA imposes a continuing and non-delegable duty on railroads to provide their employees with a safe place in which to work. *Bailey v. Central Vermont Ry. Co.*, 349 U.S. 350, 353 (1943). The position asserted by the railroad industry in this case would, as a practical matter, mean that railroads would no longer have this duty, and that there would be no effective deterrent to their negligence.

FELA was also intended as remedial legislation to facilitate recovery by workers who are injured or killed in the course of their railroad employment. *Consolidated Rail Corp. v. Gottshalk*, 512 U.S. 532, 543 (1994). Congress desired for injured railway workers to receive fair compensation for their injuries. In order to serve Congress' humanitarian purposes in enacting FELA, the Court has consistently held that FELA altered some harsh common-law rules and thereby "shif[ted] part of the human overhead of doing business from employees to their employers." *Ayers*, 538 U.S. at 145.

In this case, the Coalition has a clear interest in assisting

rail employees in protecting their rights and hopes to assist the Court in vindicating an important protection for railworkers and public safety that is threatened by the railroad industry's position in this case.

SUMMARY OF ARGUMENT

Petitioner argued both in state court and in its Petition for Writ of Certiorari to this Court that the standard applicable to railroad liability in a Federal Employers' Liability Act (FELA) case is lower than the common law negligence standard and that FELA does not require proof of proximate cause. Petitioner's arguments in the courts below and to this Court asserted that this lower standard should also apply to an employee's comparative negligence under FELA. In a remarkable shift in argument Petitioner now claims that the higher proximate cause standard should be applicable to both railroad and employee negligence under FELA. Amazingly, in shifting the argument petitioner has effectively conceded the issue upon which this Court granted certiorari. As a result petitioner asks this Court to act as a legislature and modify a statute without a valid basis for doing so on the record. Moreover, petitioner's sudden shift in argument raises serious questions under the Case or Controversy requirements of Article III of the Constitution.

Petitioner wants this Court to alter a longstanding interpretation of FELA, namely, that the Act does not require proximate cause in determining a railroad's liability for injury to a worker, and petitioner asks this court to do so without such arguments being raised at any time prior to Petitioner's Brief on the Merits before this Court. A more plain separation of powers problem is hard to imagine. A party is asking this Court to alter a longstanding interpretation of a statute—one of which Congress has long been aware—without having raised the issue in the courts below. Congress is the proper venue for the relief that petitioner seeks.

Because petitioner has effectively conceded the issue presented to this Court and addressed in the courts below, they are left asking this Court to rule on a matter for which there is no live case or controversy. In fact, they ask this Court for a ruling on a legal principle that is not raised in the record in this

case. Petitioner asks this Court for an advisory opinion. Of course, the longest settled principle of judicial restraint is that federal courts do not grant advisory opinions. Moreover, petitioner's abandonment and effective concession of the issue raised in the court below renders its case moot. The only live issue petitioner presents to this Court was not addressed or briefed until petitioner's brief on the merits before this Court. Thus, this Court should dismiss the writ of certiorari as improvidently granted, or in the alternative hold that petitioner is constitutionally barred from the relief they seek before this Court.

ARGUMENT

I. CONGRESS IS THE PROPER VENUE FOR THE RELIEF PETITIONER SEEKS

In the courts below and the Petition for Writ of Certiorari before this Court petitioner consistently argued that proximate cause was not an appropriate standard under FELA, and that the trial court erred in not applying the same relaxed negligence standard applied to railroads under FELA to a plaintiff's comparative negligence. (Pet. for Writ of Cert. at 9-12, 14 n.10); (Br. of Norfolk Southern on Appeal to the Missouri Ct. of Appeals at 2, 26, 30); (Mot. for Reh'g at 2, 3); (Mot. to Transfer to Missouri Supreme Ct. at 10). In so doing petitioner repeatedly argued that proximate cause is not the appropriate causation standard in a FELA case and as such a finding of comparative negligence should not require proof of proximate cause. (Mot. to Transfer to Missouri Supreme Ct. at 10); (Mot. for Reh'g at 2, 3). This Court granted certiorari

under the impression that this was petitioner's argument, because of course that is the argument petitioner made to this Court. (Pet. for Writ of Cert. at 2-17).

Now, in the eleventh hour, long beyond the time that petitioner could have timely raised the argument, petitioner asserts that proximate cause is the proper standard for both railroad liability and employee comparative negligence under FELA. *See generally* (Br. of Pet'r) (consistently arguing for a proximate cause standard under FELA). Such an argument runs counter to precedent in this Court and the interpretation of that precedent by every federal circuit court to reach the issue. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 503, 506-510 (1957); *Napier v. F/V DEESIE, Inc.*, 454 F.3d 61, 67 (1st Cir. 2006) ("to prove causation," a plaintiff "need only demonstrate that [the defendant's] 'negligence played any part, even the slightest, in producing the injuries for which the plaintiff seeks damages'"); *Syverson v. Consol. Rail Corp.*, 19 F.3d 824, 826 (2d Cir. 1994) (the standard for fault is statutory rather than based purely in common law); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267-68 (3d Cir. 1991) ("concept of causation under FELA is also broadly interpreted" so "injury need not be an immediate result of an accident"); *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999)("....the Supreme Court has relaxed the standard of causation [under FELA] by imposing employer liability whenever 'employee negligence played any part, even the slightest, in producing the injury or death...."); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc) (The *Rogers* case used the term "slightest" to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA" cases); *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 433-34 (6th Cir. 2003) (*Rogers* "adopted this relaxed standard in order to effectuate Congress' intent when it amended FELA in 1929 'to

preserve the plaintiff's right to a jury trial'") (quoting *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 806 (6th Cir. 1985)); *Holbrook v. Norfolk S. Ry. Co.*, 414 F.3d 739, 741-42 (7th Cir. 2005) (plaintiffs have a "light burden of proof" in FELA cases); *Fletcher v. Union Pac. R.R. Co.*, 621 F.2d 902, 909 (8th Cir. 1980) ("test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury"); *Oglesby v. S. Pac. Transp. Co.*, 6 F.3d 603, 606-09 (9th Cir. 1993) ("the standard of causation required under the FELA differs from common-law proximate causation"); *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606-07 (10th Cir. 1997) (*Rogers* "abandoned" proximate cause to determine liability under FELA).

Thus, petitioner asks this Court to grant a remedy on a matter not properly before the Court and upon which a long line of precedent—of which Congress is presumed to be aware—runs starkly against petitioner's argument. Simply put, this is a matter for Congress.

This Court has repeatedly recognized that separation of powers principles require that the Court not act as a legislature to amend statutes properly promulgated by Congress and the President, *Turner Broadcasting System Inc. v. Federal Communications Commission*, 520 U.S. 180, 195-96 (1997); *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 479 (1995); *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978), especially when a long line of precedent militates against such a change. *Hamdan v. Rumsfeld*, ___ U.S. ___, 126 S.Ct. 2749, 2841 (2006); *Shepard v. United States*, 544 U.S. 13, 23 (2005); *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). It is hard to imagine a clearer situation to which these constitutional principles should apply. Petitioner asks this Court for a remedy, and an interpretation of FELA, that they never argued for below and which they did not argue for in seeking

the writ of certiorari. Petitioner asks this Court for a remedy, and an interpretation of FELA, that it never argued in the courts below or sought in its writ of certiorari. Congress is well aware of Petitioner's hostility to the current long line of judicial precedent that contradicts petitioner's new argument here. Petitioner and other railroads have lobbied Congress virtually every year in an attempt to eviscerate FELA. Despite those efforts, *Rogers* and its progeny remain the law and Congress has not acted to amend the statute. Having failed with the Legislative Branch, Petitioners now ask this Court to legislate for them. This Court has repeatedly refused to so act. If Petitioner wants *Rogers* and the circuit court opinions interpreting it overruled they can lobby Congress again.

Moreover, in *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 105 (2001), this Court dismissed a writ of certiorari as improvidently granted in a situation where the petitioner abandoned its argument in the courts below and in the petition for writ of certiorari in favor of an argument that had not been addressed below. *Id.* at 107-110. That is precisely the situation here. The *Adarand* Court based its decision on prudential concerns, "the importance of an issue should not distort the principles that control the exercise of our jurisdiction. To the contrary, 'by adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect...for the Court's adjudicatory process.'" *Id.* at 110 (citing *Adams v. Robertson*, 520 U.S. 83, 92 n. 6 (1997) (*per curiam*)). Thus, to seek relief the petitioner would have had to lobby the legislature and/or executive officers carrying out the legislature's will. Whether based on separation of powers or prudential concerns petitioner has no sound basis to assert an argument not raised below or in the petition for writ of certiorari.

II. BECAUSE PETITIONER EFFECTIVELY CONCEDED THE QUESTION UPON WHICH CERTIORARI WAS GRANTED AND ABRUPTLY CHANGED THE ARGUMENT TO ONE NEVER RAISED IN THE COURTS BELOW PETITIONER ASKS THIS COURT FOR AN ADVISORY OPINION

This Court's longest standing principle of judicial restraint is that Article III does not authorize this Court to grant an advisory opinion. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). In one of the first pronouncements by the Justices of this Court, the Justices wrote (in a letter to President Washington) that the Court could not answer questions raised by Secretary of State Thomas Jefferson because:

> [T]he lines of separation drawn by the Constitution between the three departments of the government...being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.

Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), reprinted in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826, at 444, 488-89 (Henry P. Johnston ed., 1890). The Case or Controversy requirements of Article III continue to

preclude advisory opinions. *Rice*, 404 U.S. at 246.

Moreover, as recently as last term this Court unequivocally reinforced the importance of the case or controversy doctrines that have arisen under Article III. In an opinion by Chief Justice Roberts that ultimately addressed the issue of standing the Court held, "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Daimler Chrysler Corp. v. Cuno*, ___ U.S. ___, 126 S.Ct. 1854, 1860-61 (2006). The Court strengthened its support of the case or controversy doctrines further, "As this Court has explained, '[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Id.* at 1861 (citing *Raines v. Byrd*, 521 U.S. 811 (1997)).

What is remarkable about the current case is that petitioner has unmistakably put this Court in the position of dismissing the petition, holding against petitioner based on the fact that they are not constitutionally entitled to the remedy they seek, or granting an advisory opinion. While options one and two are quite viable, option three is not.

Why is it that petitioner must be seen as seeking an advisory opinion? Petitioner has in no uncertain terms conceded the issue upon which this Court relied in granting the petition for certiorari. (Pet. for Writ of Cert. at 9-12, 14 n.10); (Br. of Norfolk Southern on Appeal to the Missouri Ct. of Appeals at 2, 26, 30); (Mot. for Reh'g at 2, 3); (Mot. to Transfer to Missouri Supreme Ct. at 10). Petitioner has raised an argument on the merits of this case that was not briefed in its petition or raised in the courts below. *See generally* (Br. of Pet'r) (arguing for a proximate cause standard under FELA). Thus, there is no case or controversy for this Court to decide. The question which petitioner has briefed on the merits is not properly before this

Court and petitioner has effectively conceded the question that is before this Court. *Cf. Adarand*, 534 U.S. 105 (dismissing writ of certiorari as improvidently granted when petitioners abandoned the arguments raised in the lower courts and in the petition for writ of certiorari). For the Court to answer a question not properly before it on which there is no live case or controversy would be to grant an advisory opinion. *Rice*, 404 U.S. at 246; Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), reprinted in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826, at 444, 488-89.

III. BY EFFECTIVELY CONCEDING THE ISSUE RAISED IN THE LOWER COURTS AND IN THE PETITION FOR CERTIORARI PETITIONER HAS RENDERED ITS CLAIM MOOT

This Court has held that a case is rendered moot when a party concedes the primary issue upon which certiorari was granted. *City News and Novelty v. City of Waukesha*, 531 U.S. 278, 285-86 (2001); *cf. Adarand*, 534 U.S. 105. The mootness doctrine, like the advisory opinion doctrine, arises from the case or controversy requirement of Article III. *City News and Novelty*, 531 U.S. 278, 282-85. Simply put, when no valid issue remains to be heard in a case the underlying claims are rendered moot. *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975). While it is unusual for a party to moot its own claim by switching its argument to one never raised below after certiorari

is granted, such is the effect of petitioner's tactics in this case.

It should not be forgotten that both in the courts below and in its petition for certiorari to this Court petitioner argued that the lower standard for negligence, which does not require proof of proximate cause, should apply to both railroads and employees under FELA. (Pet. for Writ of Cert. at 9-12, 14 n.10); (Br. of Norfolk Southern on Appeal to the Missouri Ct. of Appeals at 2, 26, 30); (Mot. for Reh'g at 2, 3); (Mot. to Transfer to Missouri Supreme Ct. at 10). Now petitioner argues that proximate cause should be the standard for both railroads and employees, (Br. of Pet.) (arguing for a proximate cause standard under FELA), but in the lower courts and petitioner effectively conceded that a lower standard applies to FELA defendants and simply sought that same standard to apply to FELA plaintiffs. By failing to brief or address the argument made below, and upon which certiorari was granted, in any significant way petitioners have rendered the underlying arguments moot.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request that this Court dismiss the writ of certiorari as improvidently granted, or in the alternative hold that petitioner is not constitutionally entitled to the relief they seek in this case.

Respectfully submitted,

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